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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

VICTORIA A. SMITH,

Petitioner

v.

TEXAS DEPARTMENT OF WATER RESOURCES
and
THE EXECUTIVE DIRECTOR OF
THE TEXAS DEPARTMENT OF WATER RESOURCES,

Respondents

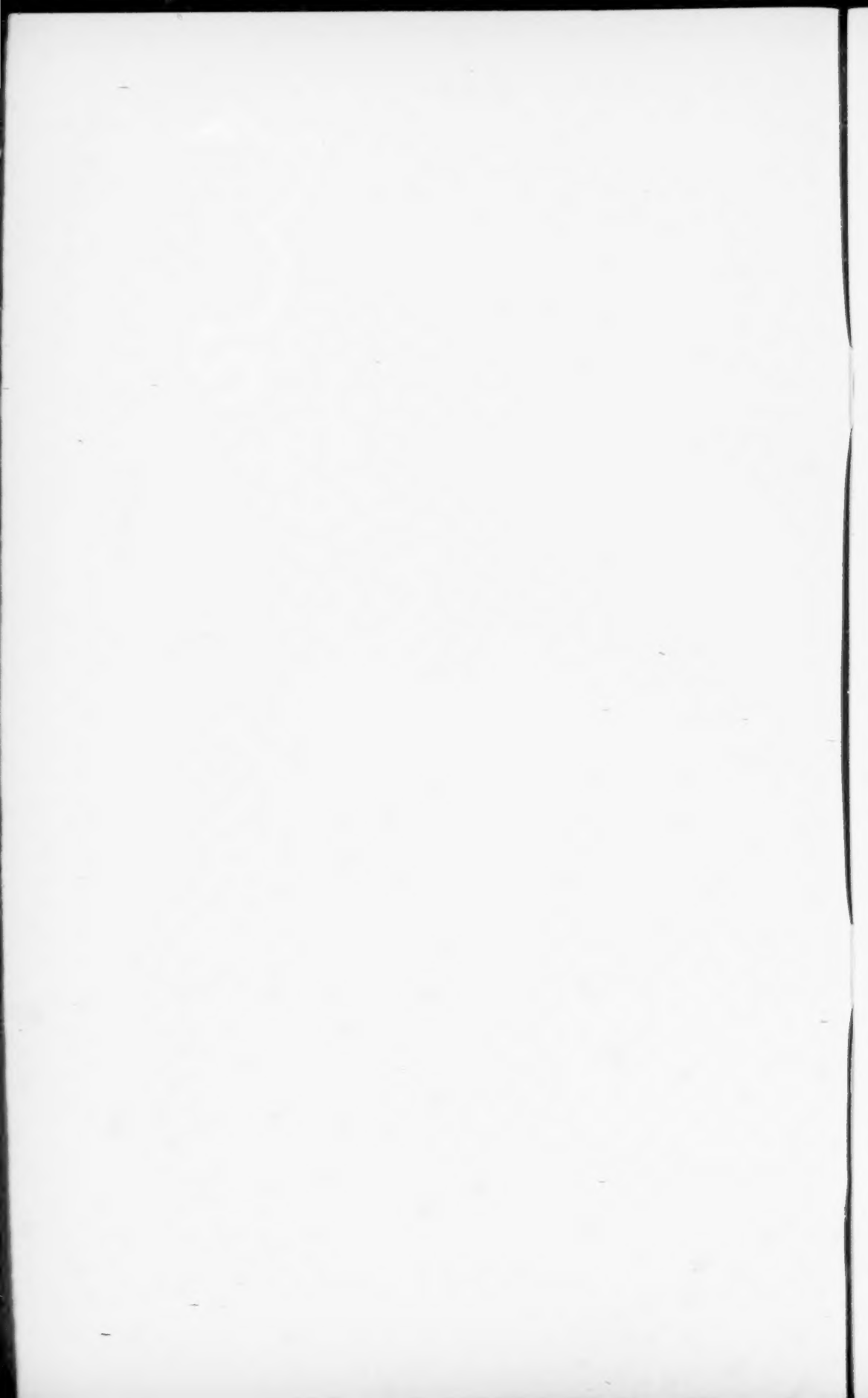
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

[NOTE: As each of the questions presented for review pertains to 42 U.S.C. Section 2000e-3(a), the applicable portions of that statute are here presented for the convenience of the Court:

“It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... [or] to discriminate against any individual ... because he has opposed any practice made unlawful by this subchapter....”

Pub.L. 88-352, Title VII, Section 704, Civil Rights Act of 1964, 78 Stat. 257; Pub.L. 92-261, Section 8(c), Mar. 24, 1972, 86 Stat. 109. For purposes of brevity, this statutory reference shall be called “the ‘opposition clause’ of Title VII” in the questions presented for review and in other parts of this Petition.]

THE QUESTIONS PRESENTED FOR REVIEW ARE:

1) Whether the Court of Appeals for the Fifth Circuit has erred in restrictively interpreting the “opposition clause” of Title VII in a fashion that eliminates important remedial protection given to employees by Title VII and sharpens an already wide split among the circuits in interpreting this provision of Title VII.

2) Whether the court below has interpreted the “opposition clause” of Title VII to require employee compliance with discriminatory employment practices of the employer unless opposition to such practices can be shown by a method that the employer schedules and sanctions or by a method that the court of appeals has arbitrarily condoned.

3) Whether the court below has created a new defense not contemplated by Title VII by characterizing, as a matter of law, the plea of an employee for more time to consider accepting a discriminatory work assignment as “unreasonable opposition”, hence, disruptive, illegal, and unprotected by Title VII.

LIST OF PARTIES

Miss Victoria A. Smith, Petitioner
(Plaintiff in the district court)

Texas Department of Water Resources, an
agency of the State of Texas, Respondent (Defendant in the district
court)

Executive Director (in his official capacity only) of the Texas Depart-
ment of Water Resources, Respondent
(Defendant in the district court)

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TEXAS DEPARTMENT OF WATER RESOURCES
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THE EXECUTIVE DIRECTOR OF
THE TEXAS DEPARTMENT OF WATER RESOURCES,

Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The Petitioner Victoria A. Smith prays respectfully that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on June 3, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit (and dissenting opinion of Politz, Circuit Judge) are reported at 818 F.2d 363 (5th Cir.1987), and are reprinted in the appendix hereto, p.A-1, *infra*. The previous opinion of the Court of Appeals in this case is reported at 799 F.2d 1026 (5th Cir. 1986), and is reprinted in the appendix hereto, p. B-1, *infra*.

The memorandum decision of the United States District Court for the Western District of Texas (Smith, W., J.) has not been reported. It is in the appendix hereto, p. C-1, *infra*. The prior memorandum decision of the District Court (June 19, 1985) has not been reported either. It is in the appendix hereto, p. D-1, *infra*.

The Fifth Circuit's Order (of July 1, 1987) denying Petitioner's Motion for Rehearing in that court is appended hereto in the Appendix at p. E-1.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered June 3, 1987, affirming the decision of the District Court for the Western District of Texas. The Court of Appeals denial of Petitioner's timely Motion for Rehearing was entered July 1, 1987. The jurisdiction of the court is invoked under 28 U.S.C. section 1254(1).

STATUTE INVOLVED

Civil Rights Act of 1964, Title VII, Section 704(a), 42 U.S.C. section 2000e-3(a), as amended:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

STATEMENT OF THE CASE

Procedural History and Basis of the District Court's jurisdiction:

This employment discrimination case was filed (on October 21, 1983) on behalf of Petitioner Victoria A. Smith in the U.S. District Court for the Western District of Texas, Austin Division, pursuant to 42 U.S.C. section 2000e, *et seq.*, Title VII of the Civil Rights Act of 1964, as amended. Suit

was filed to redress the gender-based discriminatory permanent assignment of Miss Smith, a technical employee of the Texas Department of Water Resources [TDWR], an agency of the State of Texas, to clerical/secretarial duties, and to redress her abrupt firing (effective January 31, 1983) for resisting the imposition of the permanent secretarial/ clerical assignment.

Jurisdiction of the U.S. District Court was invoked pursuant to 42 U.S.C. section 2000e, *et seq.*, as amended, 28 U.S.C. section 1343, and 28 U.S.C. section 1331. The case was tried to the court, Hon. Walter S. Smith, Jr., U.S. District Judge presiding, on April 15, 1985.

A timely charge of unlawful employment discrimination, on the basis of sex (female) had been filed before the effective date of Miss Smith's dismissal (hence, well within 180 days after the acts of discrimination) by Miss Smith with the Equal Employment Opportunity Commission [EEOC] (on January 27, 1983) [See EEOC Charge, Plaintiff's Exhibit 2, Appended hereto in Appendix F, page F-1]. This action was timely filed with the appropriate U.S. District Court within ninety (90) days after the EEOC issued its 'Right-to-Sue' letter (of August 4, 1983).

Facts Material to Consideration of the Questions Presented:

Petitioner Victoria A. Smith was only the second female ever selected for employment by TDWR in the technical assistant position in TDWR's Austin offices, Topographic Map Section. Her job title in the technical job was Engineering Aide III. Her immediate predecessor in that job had been female, but all of the previous 10 or 11 employees who had filled that position (although their titles varied, their duties had not) within the last 17 years (before trial) had been male. Only the two female technical employees in that section, Miss Smith and her predecessor, Amy Nevarez, had ever been assigned permanent clerical/secretarial duties.

Prior to her appointment as Engineering Aide III, Miss Smith had been employed by TDWR in a temporary secretarial position. It was undisputed that Miss Smith accepted employment in the technical position only after being given assurances by the interviewer that the Engineering Aide III job did not involve secretarial duties. Miss Smith sought such assurances before accepting the job because of her impression, based upon her temporary (two months') employment as a secretary in TDWR, that the rule was "once a [female] secretary, always a

secretary," and Miss Smith, owing to her technical background (Bachelor's degree in photography), was more interested and more qualified to pursue a technical career than a secretarial one.

Notwithstanding Miss Smith's technical job description and the assurances she had sought and received before accepting the technical job, Miss Smith was asked by an upper echelon supervisor in TDWR (Mr. C.R. Baskin, the Director of the Data and Engineering Services Division) to "do him a favor" by permanently undertaking duties as a relief secretary to take the place of his own secretary when she was not available to serve as his secretary/receptionist. Miss Smith resisted the assignment. She consulted her first-line supervisor, an employee of some twenty-seven years with TDWR and its predecessor agencies, who bore primary responsibility for supervising Miss Smith's work in the job for which she had been hired. Miss Smith's immediate supervisor disagreed with the appropriateness of the secretarial duty assignment and had, accordingly, refused to assign the secretarial duties in question to Miss Smith when asked to do so by the Division Director, Mr. Baskin. Her immediate supervisor was of the opinion that such secretarial relief duties were not within the scope of Miss Smith's job and ought not to have been asked of her. His views were shared with Miss Smith when she consulted him about what to do in response to the Division Director's request.

Miss Smith resisted the assignment primarily by seeking audience with the Executive Director of the agency and by asking Mr. Baskin for more time to consider the matter. Mr. Baskin's response to Miss Smith's telephone request for more time to think about it was to hang up the phone on her. There was no evidence indicating that operations of the employer were disrupted in any way by Miss Smith's request for more time to think about it. Before Miss Smith was asked to undertake the secretarial relief duties, other secretaries had performed them; and after she resisted the assignment and was fired, the same secretaries continued to perform the relief secretarial duties.

The undersigned cannot improve upon the description of Miss Smith's firing formulated by Judge Politz from the evidentiary record: "Director Baskin worked his will. He decreed that Victoria Smith would either do the secretarial duties he assigned or she would be fired. The entire process was prestructured. On January 17, Smith was given a memo from Baskin telling her to report for secretarial relief duties on

January 20, 'or else.' Simultaneously, on January 17, the papers terminating Smith were prepared and signed by the Personnel Director, Baskin, and Charles E. Nemir, Executive Director of the Texas Department of Water Resources. Ms. Smith was in fact discharged before the time arrived for her to perform." *Smith v. Texas Dept. of Water Resources*, 818 F.2d 363 (5th Cir. 1987), *dissenting opinion* of Politz, Circuit Judge, 818 F.2d at 369.

The January 17 memo also chided Miss Smith for her reluctance to do the favor asked of her and told her that the typing of correspondence would "provide an opportunity for you to maintain your secretarial skills."

Following delivery of the memorandum and Miss Smith's aborted attempt to discuss the matter further with Mr. Baskin, the Division Director, Miss Smith was never asked by Mr. Baskin's secretary to come relieve her, as was the customary method for initiating secretarial relief work in the agency. Miss Smith was informed on January 31, 1983, at nearly five o'clock p.m. that she was dismissed and had a few minutes to clean out her personal possessions from the workplace and sign forms pertaining to the termination of her employment. Prior to her January 31, 1983, dismissal, Miss Smith was encouraged by TDWR's personnel office to apply for a *secretarial* job in that agency, apparently as a suggested method for avoiding termination of her employment.

In violation of then-current TDWR policy for termination of a probationary employee, Miss Smith's immediate supervisor was not consulted about the decision to fire her. That supervisor also expressed the opinion at trial that Miss Smith was treated unfairly and that she had been an exemplary employee, unlike a former male technical assistant in Topographic Mapping who had been insubordinate repeatedly and against whom no disciplinary action was ever taken.

Curiously, TDWR's personnel director considered Miss Smith eligible for re-employment at TDWR and for favorable recommendation to other employers, notwithstanding her firing for alleged insubordination.

It was the observation of Judge Politz, Circuit Judge dissenting in the court below, that Miss Smith's nemesis, Baskin, "violated Title VII not only when he fired her, but when he first demanded that she accept secretarial duties." *Smith v. Texas Dept. of Water Resources*, 818 F.2d 363

(5th Cir. 1987), at 371 n.1 (Dissenting opinion of Politz, Circuit Judge).¹

REASONS FOR GRANTING THE WRIT: ARGUMENT AND AUTHORITIES

The result reached by the Court of Appeals in its opinion below turns on that court's interpretation of the "opposition clause" of section 704(a) of Title VII, Civil Rights Act of 1964, section 704(a), 42 U.S.C. section 2000e-3(a) as amended. This court has spoken to the opposition clause of Title VII's section 704(a) only twice (in the mid-1970's); and those two cases offer only minimal guidance on the extent and nature of the types of opposition to discriminatory treatment protected under Title VII's 'opposition clause.' The various circuit courts of appeals have, accordingly, felt free to take very divergent approaches to interpretation and construction of the 'opposition clause.'

This court's seminal opinion on the burden of proof in Title VII cases, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), held that section 704(a) does not require an employer to rehire a person who has deliberately engaged in *unlawful, disruptive* acts against it. *Id.*, 411 U.S. at 803-804, 93 S.Ct. at 1825 [Emphasis added].

In *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50, 95 S.Ct. 977, 43 L.Ed.2d 12 (1975), this Court mentioned Section 704(a) of Title VII but expressly declined to offer guidance on the extent of section 704(a)'s protection (beyond quoting *McDonnell Douglas Corp. v. Green*, *supra*): "Whether the protection afforded by Section 704(a) extends only to the right of access [to the EEOC and the federal courts] or well beyond it, however, is not a question properly presented by these cases." *Id.*, 411 U.S. at 72, n. 25, 95 S.Ct. at 989, n. 25. Petitioner submits that this case does properly present the question which this Court

1. Counsel have not attempted to brief Miss Smith's unlawful assignment claim because to do so would unnecessarily extend the length of this document. The courts have long recognized that job assignments made on the basis of racial or sexual stereotypes are a violation of Section 703(a) of Title VII. *See, Futron v. King Radio Co.*, 501 F.Supp. 734, 741 (N.D. Ga. 1980) (finding discrimination on the basis of sex where clerical duties were assigned to female talkshow host and finding unlawful retaliation after she was discharged for protesting the clerical assignment); *Int'l Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 338, 97 S.Ct. 1843, 1855, 52 L.Ed.2d 396 (1977); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 398-401, 97 S.Ct. 1891, 1893-1895, 52 L.Ed.2d 453 (1977); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 321-328 (5th Cir. 1977); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 231-232 (5th Cir. 1974).

declined to address in *Emporium Capwell Co. v. W. Addition Comm. Org.*, *supra*. In light of the divergence of positions taken by the Courts of Appeals on this question in the dozen years since this court acknowledged the existence of the question, it seems timely for this Court to assist the lower courts with an answer.

Guidance from this court is necessary because the wording of section 704(a) does not say what kind of opposition is protected by the statute, and the legislative history of this section provides no guidance. See, 42 U.S.C. Section 2000e-3(a), H.Rep. No. 914, 88th Cong., 2d Sess., U.S. Code Cong. & Admin. News, p. 2401 (1964); H.Rep. No. 570, 88th Cong., 1st Sess. 5 (1963). While Petitioner believes that the meaning of this section can be inferred from the remedial purpose of the Congress in enacting Title VII, it is nevertheless evident that the Courts of Appeals have read very different meanings, values and requirements into the same statutory language.

In the holding below, the Court of Appeals claims to have applied the "balancing test," such as it is, invented in *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222,231 (1st Cir. 1976), and adopted by the Fifth Circuit in *Jefferies v. Harris County Community Action Assoc.*, 615 F.2d 1025,1036 (5th Cir. 1980). By the Fifth Circuit's reckoning of this test as expressed in the instant case below, the court is supposed to weigh "the employer's right to run his business... against the rights of the employee to express his grievances and promote his own welfare." *Smith v. Texas Department of Water Resources*, 818 F.2d 366 (5th Cir. 1987). In the holding below, however, and in other Fifth Circuit opinions of recent years, the so-called "balancing test" has been so heavily weighted in favor of the employer as to automatically relegate any employee opposition of discriminatory employment practices to the category of *unprotected* opposition. Notably, instead of considering in its "balancing test" whether the opposed employment practice violates Title VII, the Fifth Circuit apparently requires the employee to demonstrate that the employment practice being opposed is "immoral, degrading, or dangerous to health." *Id.*, 818 F.2d at 370. Aside from missing the point, this stiff test, if applied across the board, would obviate the need for any but the most egregious victims of discrimination to seek Title VII relief from the courts. Certainly the legislative history of Title VII as a remedial measure would suggest a less strenuous test for defining Title VII violations that ought to be opposed by the most loyal and conscientious of employees.

In the instant case, the "balancing test" applied by the Court of Appeals accorded no weight at all to the interests of Miss Smith in trying to resist a discriminatory job assignment. The result, Petitioner believes, is that in the Fifth Circuit the opposition clause protects employees only from retaliation for participating in an EEOC charge or similarly formal proceedings; whereas employee efforts at informal means of expressing disapproval of discriminatory employment practices are not protected at all, in spite of language in the opposition clause which appears intended to protect employees in that context also. Thus, present law in the Fifth Circuit, which seems in accord with the Sixth Circuit, is in sharp conflict with the law of the Third, Fourth, Seventh, and Ninth Circuits. Further, the holding of the court below conflicts with the remedial and conciliatory purposes of Title VII, and strongly encourages employees with a reasonable belief that an employment practice is illegal to file formal charges before or instead of talking to the employer or their supervisors about the problem. This result is not in harmony with the emphasis placed by the Congress in Title VII upon conference, conciliation, and persuasion. *See, e.g., 42 U.S.C. section 2000e-5.*

In deciding Miss Smith's case, the Court of Appeals attempts to distinguish two other opposition clause cases, *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 130 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982), and *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir. 1981), but fails to provide any principled explanation why Title VII would protect picketing or persistent complaining, but not Miss Smith's non-disruptive opposition to a specific discriminatory job assignment.

No less than three times on one page of its opinion, the Court of Appeals said that Miss Smith (a technical employee) should have accepted the offending secretarial assignment and then filed an EEOC charge. (The courts below ignored the undisputed fact that Miss Smith did file an EEOC charge alleging unlawful assignment before the effective date of her dismissal.) *Smith v. Texas Dept. of Water Resources*, 818 F.2d 363, 365 (5th Cir. 1987). *See, Appendix F, p. F-1* (Miss Smith's EEOC Charge, Plaintiff's Exhibit 2).

In five out of six cases (including the instant case) interpreting the opposition clause of section 704(a) it has decided since 1980, the Fifth Circuit has found the opposition activity to be unprotected. (Curiously, each of the five cases involve women plaintiffs, four of whom were

complaining of sex discrimination.) The sixth, *Payne v. McLemore's Wholesale & Retail Stores*, 645 F.2d 1130 (5th Cir. 1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982), involved a black male who had participated in a boycott and picketing. In its opinion below, the Court of Appeals attempted to distinguish *Payne* from the case at bar on spurious grounds. The result in *Payne* turned on the failure of the defendant to raise the defense of an unreasonable form of opposition at trial. In dictum, the *Payne* court merely suggested that picketing by a person who is not an employee at the time may be protected by section 704(a). *Id.*, 647 F.2d at 1145.

In *Rosser v. Laborers' International Union*, 616 F.2d 221 (5th Cir. 1980), the Fifth Circuit held that a black woman who had stood for an elected union position against her supervisor was not protected by section 704(a) from dismissal because she had "placed her loyalty in question". As in *Miss Smith's case*, the court said that the plaintiff should have expressed her opposition in another way, such as helping union members file EEOC charges. *Id.*, 616 F.2d at 224, n. 3. In *Lindsey v. Mississippi Research & Development Center*, 652 F.2d 458 (5th Cir. 1981), the Court of Appeals *sua sponte* characterized the claim as a retaliatory discharge claim and then proceeded to discredit and reject it.

In *Jefferies v. Harris County Community Action Association*, 615 F.2d 1025, (5th Cir. 1980), a black female who believed she was discriminated against in a promotion decision sent a photocopy of the relevant personnel action file to the chairman of the personnel committee and was terminated, according to her employer, for unauthorized transmittal of confidential documents. The Court of Appeals found that the employer's interests outweighed her interest in her choice of opposition method, and intimated that the employer's established grievance procedure should have been used. *Id.*, 615 F.2d at 1036. In *Jones v. Flagship Int'l*, 793 F.2d 714 (5th Cir. 1986), *cert. denied*, 107 S.Ct. 952 (1987), the Court of Appeals held that section 704(a) did not protect a discharged equal employment opportunity manager who tried to recruit other employees to join her in a class action employment discrimination suit.

The Sixth Circuit's approach to defining the protection afforded by section 704(a) is very similar in principle to that of the Fifth Circuit. In *Holden v. Owens-Illinois*, 793 F.2d 745 (6th Cir. 1986), the Sixth Circuit refused to extend the protection of the opposition clause to a female manager of a company affirmative action program who was fired after

having made efforts to support employees who had complained of unlawful discrimination. Like the court in the holding below, the Sixth Circuit in *Holden* upholds a paramount employer practice of "Do what you're told, no matter what!" The court in *Holden* also seems to require proof of an actual violation of Title VII as well as an undefined "reasonable" form of opposition in order to extend section 704(a) protection to an opponent of discriminatory policies.

Other circuits have given much broader interpretations of the kinds of activities which constitute reasonable opposition protected by section 704(a) of Title VII. In two 1978 cases, the Third Circuit expressly rejected the position that section 704(a) was intended only to protect access to the EEOC and the courts and not the right to express opposition to discriminatory practices. *Novotny v. Great American Savings & Loan Assn.*, 584 F.2d 1235 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979)(violation of Title VII cannot be asserted through a 42 U.S.C. section 1985(3) claim); *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960 (Third Cir. 1978). In *Novotny*, the Court of Appeals suggested that conduct which was neither illegal nor unreasonably interfered with an employer's "legitimate interests" would be protected. *Id.*, 584 F.2d at 1261. In *Hicks*, an act clearly against the interests of the employer, that of writing a letter to the government agency funding the consultant employer, was deemed protected by the opposition clause of section 704(a). *Id.*, 572 F.2d at 969.

The Fourth Circuit accorded relief under section 704(a) to a woman salesman who was fired for declining to handle an unrewarding and troublesome account that other male salesmen had refused to handle without consequence. *Armstrong v. Index Journal Co.*, 647 F.2d 441, 447-449 (4th Cir. 1981). In the case at bar, the Fifth Circuit Court of Appeals correctly noted the similarity of facts between the two cases, but failed to provide any principled reason for distinguishing retaliation against Miss Smith, who opposed a particular instance of discriminatory assignment of a female technical employee to secretarial/clerical duties, from retaliation against Ms. Armstrong, who also opposed a particular instance of discriminatory assignment but who, to her doubtful credit, also had a history of complaints about sex discrimination. *See Smith v. Texas Dept. of Water Resources, supra*, 818 F.2d 363 (5th Cir. 1987). The Fourth Circuit has also held that the opposition clause of section 704(a) protected a black female probationary employee discharged in retaliation for her complaint that she had not been called to work because of her

race. *Holsey v. Armour & Co.*, 743 F.2d 199 (4th Cir. 1984), cert. denied, 470 U.S. 1028, 105 S.Ct. 1395 (1985).

The Seventh Circuit, in *Moze v. Jeffboat*, 746 F.2d 365, 373-74 (7th Cir. 1984), remanded a case for reconsideration of plaintiff's retaliation claim. In that case employees who absented themselves from work in order to engage in public protests against the employer's allegedly discriminatory practices were dismissed. The Court of Appeals refused to rule as a matter of law that such conduct was so "excessively disloyal or hostile or disruptive and damaging to the employer's business" as to lose the protection of section 704(a). *Id.*, 746 F.2d at 374, quoting *Croushorn v. Board of Trustees*, 518 F.Supp. 925 (M.D. Tenn. 1980).

In *Jennings v. Tinley Park Community Consol. School Dist.*, 796 F.2d 962, 967-68 (7th Cir. 1986), the Seventh Circuit remanded another retaliation claim by a secretary who was dismissed after preparing a salary study showing inequitable compensation given to (female) secretaries in comparison to (male) custodians. The Seventh Circuit ruled that an employer's claim of a loss of trust and confidence in an employee is not a sufficient legitimate, non-discriminatory reason to justify a Title VII plaintiff's dismissal. The court made it clear that the trial court should measure the disruptiveness of the employee's behavior, not the employer's reaction to the employee's opposition act or acts. Noting that almost any assertion of Title VII rights will involve some sense of "disloyalty", the Seventh Circuit directed that the trial court on remand apply the reasonableness test expounded by the Ninth Circuit in *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983), to determine whether the employer's charge of disloyalty was legitimate. *Jennings v. Tinley Park Community Consol. School District, supra*, 796 F.2d at 968.

In *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983), the Ninth Circuit reversed the trial court's finding that an employee group's letter to an important customer charging the company with racism constituted a "disloyal" and therefore "unreasonable", hence unprotected form of opposition to employment practices perceived as discriminatory. As the Ninth Circuit wisely observed, "If discharge or other disciplinary sanction may be imposed based simply on 'disloyal' conduct, it is difficult to see what opposition would remain protected under section 704(a)." *Id.*, at 1014.

Under the Ninth Circuit's reasonableness test, to deny good faith opposition activities the protection of section 704(a), the conduct must have significantly disrupted the workplace or directly hindered the employee's performance in the job for which he or she was employed. *EEOC v. Crown Zellerbach, supra*, 720 F.2d at 1015. The court noted that the plaintiffs' letter did not disrupt their workplace and did not affect their job performance and specifically found that threatened economic harm did not constitute unreasonable opposition. *Id.*, 720 F.2d at 1016, citing *Sias v. City Demonstration Agency*, 588 F.2d 692, 695-96 (9th Cir. 1978) and *Hicks v. ABT Assocs., Inc., supra*, 572 F.2d at 969 Cir.

The majority of Courts of Appeals which have addressed a question of whether section 704(a) protects particular opposition activity have cited the First Circuit's decision in *Hochstadt v. Worcester Foundation, etc.*, 545 F.2d 222 (First Circuit, 1976). That case involved a female medical researcher who believed her salary was inequitable and discriminatory and engaged in many abrasive "opposition" activities over a period of time, and was finally dismissed. The *Hochstadt* court devised a balancing test: "[C]ourts have in each case to balance the purpose of the Act to protect persons engaging reasonably in activities opposing sexual discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel." *Id.*, at 231. The First Circuit reduced the question to, "whether plaintiff went 'too far' in her particular employment setting."

The *Hochstadt* court declared that the only standard which could be used in conducting the balancing test was a judge's "rule of reason" applied to a given set of facts. Petitioner submits that this is hardly a standard. As shown by the diverse results reached by the Circuit Courts of Appeals in opposition clause cases, the *Hochstadt* balancing test has become nothing more than a recital exercise justifying each court's *ad hoc* findings, not a legal standard which guides the decision and review of section 704(a) cases.

In the *Hochstadt* case, the First Circuit made frequent mention of the plaintiff's "disloyalty." In its opinion below the Fifth Circuit consistently describes Miss Smith's opposition as "insubordination" and cites *Hochstadt* as ruling that an employer is entitled to loyalty and cooperativeness from employees. *Smith v. Texas Dept. of Water Resources*, 818 F.2d at 366. The entire thrust of the *Smith* opinion conveys the message that the opposition clause of Title VII protects victimized employees only if they

do what their employers tell them to do, and express any complaints only through "proper" channels. By contrast, the Seventh and Ninth Circuits have had little difficulty distinguishing *Hochstadt* on its facts and discounting the weight of employers' claims that plaintiffs' opposition activities had proven them "disloyal." E.g., *Mozee v. Jeffboat*, *supra*, 746 F.2d at 374, *Jennings v. Tinley Park Community School Dist.*, *supra*, 796 F.2d at 968, *EEOC v. Crown Zellerbach Corp.*, *supra*, 720 F.2d at 1014.

With the case at bar this Court has an opportunity to resolve confusion and conflict among the lower courts and to provide them with a real standard to apply in section 704(a) opposition clause cases. Petitioner does not suggest that a foolproof formula can be contrived for every case -- trial judges will still have to balance the interests of employers and employees in light of a particular fact situation. However, this court could provide a great deal of clarity and guidance by more fully describing the kinds of behavior which should be deemed "reasonable" or "unreasonable" opposition behavior. The Court may find that this goal would be furthered by an articulation of the overall purpose of section 704(a) of Title VII which would answer the question, eschewed by the court in *Emporium Capwell Co. v. Western Addition Org.*, *supra*, 411 U.S. at 72, n.25, 95 S.Ct. at 989, n.25, of whether Congress intended that employees be protected in the workplace where they are beyond the immediate reach of any help available from the enforcement machinery of Title VII, or whether it intended only to protect access to that enforcement machinery. More narrowly, this case poses the question of whether Victoria Smith could "be fired for declining to accept gracefully that which Title VII forbade her employer to do, i.e., discriminate against her because of her sex." *Smith v. Texas Dept. of Water Resources*, 818 F.2d 363 (5th Cir. 1987), at 372 (Dissenting opinion of Politz, Circuit Judge).

CONCLUSION

The writ of certiorari should be granted by the Court in this case because:

A) There is a conflict between the Fifth Circuit's interpretation and application of Title VII's "opposition clause" in the opinion below and the interpretation and application of the "opposition clause" in the opinions of the Third, Fourth, Seventh and Ninth Circuits.

B) The Fifth Circuit's interpretation of Title VII's "opposition clause"

in the opinion below requires an employee to comply with her employer's demands (even if the demands violate Title VII), and the opinion contains no principled analysis of what constitutes reasonable employee opposition to such unlawful demands.

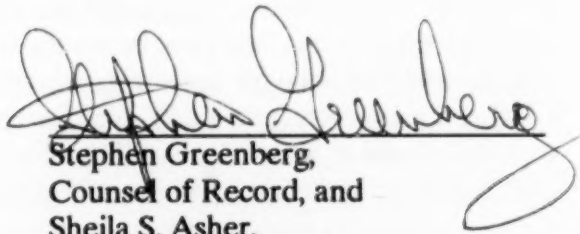
C) The Fifth Circuit's tortured analysis of Title VII's "opposition clause" has transformed into *disruptive* and *illegal* conduct an employee's innocuous request for more time to reconsider her supervisor's demand that she 'do him a favor.'

D) Justice requires further review of the Fifth Circuit's peculiar result in this case.

E) This Court ought to use this opportunity to articulate standards for the uniform application of Title VII's "opposition clause" as the law of the land, to prevent fragmented and inconsistent application of this important statute.

WHEREFORE, PREMISES CONSIDERED, Petitioner Victoria A. Smith prays that the petition for writ of certiorari be granted.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Stephen Greenberg", is written over a horizontal line. The signature is fluid and cursive, with a large loop at the end.

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**Victoria A. SMITH on behalf of herself and all others
similarly situated, Plaintiff-Appellant,**

v.

**TEXAS DEPARTMENT OF WATER RESOURCES, et al.,
Defendants-Appellees.**

No. 85-1453.

**United States Court of Appeals,
Fifth Circuit.**

June 3, 1987.

Before REAVLEY and POLITZ, Circuit Judges, and KAZEN*,
District Judge.

KAZEN, District Judge:

Upon initial appeal, we vacated the judgment in favor of the Defendants and remanded to the district court for more specific findings. *Smith v. Texas Dept. of Water Resources*, 799 F.2d 1026 (5th Cir. 1986) (*Smith I*).

In *Smith I*, we recited in some detail the evidence developed at the trial of the case, and observed that this evidence "obviously could lead to sharply conflicting conclusions." 799 F.2d at 1029. We suggested that the decision as to which conclusions should be reached would require the resolution of several key fact questions. *Id.* The trial court has now made supplemental findings of fact and conclusions of law, essentially resolving all key fact disputes in favor of the Defendants and reaffirming the conclusion that Plaintiff failed to establish her cause of action.

The trial court has now found that in January, 1983, C.R. Baskin, Director of the Data and Engineering Services Division of the Texas Department of Water Resources ("TDWR"), requested that Plaintiff Smith provide secretarial relief twice daily, one half-hour in the morning and again in the afternoon and reminded her that her job description

*District Judge of the Southern District of Texas, sitting by designation.

required her to "assist in other division programs as needed"; that Bill Caskey, the Assistant Director of the Division, "routinely performed" daily relief services for Baskin's secretary during the afternoon mail run; that during the period in question TDWR was experiencing budgetary cutbacks and a 20% reduction in personnel which required Baskin to look for more efficient, flexible means of relieving the secretaries; that the decision to add secretarial relief duties to Smith's regular duties was within Baskin's discretion and not violative of TDWR policies; that Smith was specifically advised that her refusal to accept this work assignment would be grounds for termination; that Smith failed to report as instructed; that Charles Nemir, Executive Director of TDWR, told Smith that if she would assist Baskin as requested, Nemir would instruct the personnel office to find Smith a lateral transfer to a technical position in a division where she would not be required to do secretarial relief; that Smith refused this offer; that a male predecessor of Smith's failed on several occasions to adequately perform routine tasks in the map room, but that TDWR did not consider him "insubordinate" for those failures and that he was not disciplined for them; and that performance by Smith of the requested relief duties would not have adversely affected her job evaluations.

Findings of fact shall not be set aside on appeal "unless clearly erroneous." Fed.R.Civ.P. 52(a). "This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). The trial court's findings "cannot be clearly erroneous" when they constitute a choice between "two permissible views of the evidence." *Id.* at 574, 105 S.Ct. at 1512. If the trial court's version of the evidence is "plausible," this Court may not reverse. *Id.* This standard requires us to "extend great deference to the district court's findings." *Hamilton v. Rogers*, 791 F.2d 439, 442 (5th Cir.1986). After a thorough review of the evidence, we are persuaded that, while this case could easily have been decided differently, the trial court's findings cannot be considered an implausible view of the evidence.

[1] It is clear that Smith was directed to perform secretarial relief work for Baskin and refused to do so despite at least two warnings that a refusal would result in termination. She chose this act of insubordination in lieu of complying with the order and challenging it through proper

legal procedures.¹ When Smith discussed her proposed termination with Charles Nemir, the Executive Director of TDWR, he explained to her the need for management flexibility in meeting the budgetary and personnel problems which had developed. He proposed that if Smith would accept the relief assignment, every effort would be made to relocate her to a similar position in the department, where she would not have to perform the unwanted duties. Smith refused this offer.

[2] We cannot agree that the opposition clause, 42 U.S.C. § 2000e-3(a), protected Smith in this situation. This is not a case where Smith was terminated for filing a charge or complaint under Title VII. As indicated in note 1, *supra*, had she accepted the assignment and then filed a proper complaint, she clearly would have been protected against retaliation. Nor is this a case where Smith was terminated for picketing activities or other complaints of discrimination, as in *Payne v. McLemore's Wholesale & Resale Stores*, 654 F.2d 1130 (5th Cir.1981) *cert. denied* 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982) and *Armstrong v. Index Journal Co.*, 647 F.2d 441 (4th Cir.1981), the cases cited by the dissent.

[3] While *Payne* involved picketing and boycott activities, *Armstrong* is factually closer to the instant case. There, the plaintiff was a salesperson who had been persistently complaining about a separate job classification reserved for women only, a lower base pay than males, and assignment of certain types of accounts to her. At one point, she resisted accepting a specific account and asked what would be the consequences of her refusal. She was assured that she would not be fired and that the account would be transferred to another salesperson, a practice routinely followed by the employer. Nevertheless, she was subsequently fired. The court found that the firing was not due to any isolated incident but was rather "the culmination of her persistent complaints." 647 F.2d at 448. These complaints pertained to a variety of discriminatory practices

1. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice for an employer to discriminate against any individual with respect to her terms or conditions of employment, because of such individual's sex. 42 U.S.C. § 2000e-2(a)(1). Although Smith urges that the acceptance of part-time secretarial duties would have eventually affected her future advancement, there is little evidence to support that proposition. Nevertheless, the foregoing provision is not limited to "economic" or "tangible" discrimination. It strikes at "the entire spectrum of disparate treatment of men and women. *Meritor Savings Bank, FSB v. Vinson*, ___ U.S. ___, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986). See also *Jones v. Flagship Intern.*, 793 F.2d 714 (5th Cir.1986). Thus, Smith could have accepted the assignment and then challenged it as discriminatory. Such a challenge would have been protected from retaliation. 42 U.S.C. § 2000e-3(a).

between males and females. The court also noted that it would not have been extraordinary for the employer to simply transfer the undesired account to another person, and yet no effort was made to do so. By contrast, in this case it was entirely plausible to find that Smith's employer did not use her refusal to accept the job assignment as a pretext to fire her for previous complaints of discrimination, and also to find that Smith rejected efforts to seek a solution to the problem.

Both *Payne* and *Armstrong* affirm, moreover, that not all activity purportedly done in opposition to perceived unlawful employment practices is protected by the opposition clause. Thus *Payne* acknowledged that there are instances "where the employee's conduct in protest of an unlawful employment practice so interferes with the performance of his job that it renders him ineffective in the position for which he was employed," which conduct is not protected. 654 F.2d at 1142. *Armstrong* stressed that the opposition clause "was not intended to immunize insubordinate, disruptive, or nonproductive behavior at work." 647 F.2d at 448. Both opinions rely upon the seminal opinion in *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir.1976). Drawing upon legislative history reflecting that management prerogatives are to be left undisturbed to the greatest extent possible, *Hochstadt* held that an employee is not immune from discharge merely by claiming that she was opposing discriminatory practices, and that an employer remains entitled to loyalty and cooperativeness from employees. 545 F.2d at 230. The court specifically rejected an argument that the opposition clause immunizes any employee conduct arguably relevant to the employee's opposition to discrimination:

"We doubt that Congress meant to go this far, particularly because an employee who feels that his employer has violated his rights under Title VII may pursue specific state and federal legal remedies for discrimination and need not rely on vigorous internal action directed against the employer."

545 F.2d at 231 n. 6.

We have heretofore adopted a balancing test, derived from *Hochstadt*, requiring the employee's conduct to be reasonable in light of the circumstances and balancing the employer's right to run his business against the right of the employee to express grievances and promote her own welfare. *Jones v. Flagship International*, 793 F.2d 714, 728 (5th Cir.1986); *Payne*, 654 F.2d at 1142; *Jefferies v. Harris Cty. Community Action Ass'n*, 615 F.2d 1025, 1036 (5th Cir.1980). Employing this balanc-

ing test, we find Smith's conduct to be unreasonable in light of the circumstances. She refused to perform a specific job assignment despite being asked more than once to do so under penalty of termination. While the assignment was obviously unpalatable to her, it was certainly not immoral, degrading, or dangerous to her health. *Compare Meyer v. Brown & Root Const. Co.*, 661 F.2d 369 (5th Cir.1981). It had no immediate adverse effect on her salary or other terms of employment. She simply assumed that the relief work would involve more than the stipulated 30 minutes per half-day. She rejected an offer to accept the position temporarily while other arrangements could be made, and spurned any recourse to available legal processes. We do not think Congress intended the opposition clause to protect this form of self-help.

[4,5] Smith contends that she was terminated for insubordination while a previous male employee, Gutierrez, was not. The evidence in this regard, however, is not persuasive. Gutierrez had worked under Emil Blomquist in the Topographic Mapping Section on some earlier occasion. Blomquist cited an occasion when Gutierrez failed to comply with a directive to put a special type of stamp on certain maps and inventory tags on others. He was not disciplined in any way. Blomquist was told by his superiors to handle the incident himself. Blomquist conceded that Gutierrez was a non-probationary employee, making it more difficult to terminate him under department policies,² and that Blomquist never recommended that Gutierrez be terminated for this conduct. Bobby Ray Critendon, Blomquist's superior, characterized the problems with Gutierrez as being minor and more a result of laziness rather than insubordination. The evidence fails to indicate that Gutierrez' conduct was comparable to Smith's.

[6] Smith also relies upon evidence that only she and her immediate female predecessor were ever asked to do relief secretarial work, while males previously employed as an Engineering Aide III in Topographic Mapping were not given that extra assignment. However, Nemir explained that the department had been under some budgetary pressures and had incurred staff reductions making it necessary to be flexible in order to accomplish its tasks within the allotted resources. He explained that Smith's position was "not a high priority job," and that in utilizing their resources most efficiently, the department would transfer people

2. Even if an employee's probationary status would make it easier to discharge her under department policies, it would not justify a discharge motivated by a discriminatory animus. See *Smith I*, 799 F.2d at 1031.

from areas where the individuals could be more easily spared. It should be noted that the Topographic Mapping Section was not a large one. It consisted of Blomquist and one aide. The position was not even filled when Smith left. Smith and her immediate predecessor were female aides while the prior aides were males. This is not a case where Smith was selected from among other male aides to do relief secretarial work. Asked why Smith's male predecessors had not been asked to do other duties, Nemir stated that the situation requiring assignment changes had not developed previously. Blomquist, an ardent witness for Smith, conceded that Baskin had attempted to rotate secretaries to handle relief work prior to asking for Smith's assistance, but had found this procedure unsatisfactory.

[7] Smith also urges that the direct assignment of duties to her by Baskin was in violation of department policies and that the decision to fire her without consulting her immediate supervisor, Blomquist, was also irregular. Again, however, while there is some support for her position, the evidence is mixed. Thus Blomquist testified that Baskin first consulted him about the desire to have Smith do secretarial relief work. Blomquist objected to the proposal, stated that he did not wish to relay this assignment to Smith, and asked Baskin to handle it directly. Personnel Director Gary Otting opined that the proposed assignment of Smith was within her job description and did not constitute a unilateral rewriting of the job description by Baskin. Critendon added that Baskin would have had authority to change the job description anyway. Critendon also testified that Smith's performance of part-time work for Baskin would not have adversely affected her future evaluations because she would have been evaluated on the basis of the type of job or jobs she was performing and that Baskin himself would have had the opportunity to review and comment upon her evaluations.

To recite the foregoing evidence is not to gainsay the existence of contrary evidence. It does, however, illustrate that the trial court's findings reflect a permissible or plausible view of the evidence and thus cannot be declared "clearly erroneous." Because those findings support the ultimate conclusion, the judgment is **AFFIRMED**.

POLITZ, Circuit Judge, dissenting:

Because I am persuaded beyond peradventure that the district court

should be reversed, I respectfully dissent. The treatment accorded Victoria Smith by Charles Baskin, Division Director, was undeniably sexually based and motivated. I understand that by adopting Title VII Congress acted to proscribe that sort of gender-based discrimination towards employees. Notwithstanding, today we have permitted such.

The majority correctly notes that the "clearly erroneous" standard restrains a reviewing court from reversing the trier of fact" simply because it is convinced that it would have decided the case differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518, 528 (1985). But the courts of appeals have not been made into courts of legal error only. To do so would require a rule change. Fed.R.Civ.P. 52(a).

The time-honored standard teaches that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948). *Anderson* teaches further "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson*, 470 U.S. at 574, 105 S.Ct. at 1512, 84 L.Ed.2d at 528. But *Anderson* does not supplant our duty to conduct "a comprehensive review of the entire record," *Id.*, 470 U.S. at 581, 105 S.Ct. at 1515, 84 L.Ed.2d at 533 (Powell, J., concurring); *Parker v. Mississippi State Department of Public Welfare*, 811 F.2d 925 (5th Cir.1987). As we recently stated in *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1044 (5th Cir.1987), "Congress surely did not intend Rule 52(a) to constrict as a Victorian corset, binding the courts of appeals to the findings of the district court absent a careful and fitting examination."

Victoria Smith was a secretary. She was a good secretary but she had higher aspirations, as she viewed them, and desired to move into the technical field. She saw an opening for an Engineering Aide III and applied for the job, even though it meant a substantial pay cut. Before accepting the job, she made certain that it was a technical job with no secretarial-type duties. She was assured of that.

She performed her work well. Her first-line supervisor, Gustav "Emil" Blomquist, testified that she was a fine employee. Her second-line supervisor, Bobbie Ray Critendon, gave her high marks, finding her

to be a fast study who was "becoming an outstanding employee" in her new, technical assignment as an Engineering Aide III in the Topographic Mapping Section.

Notwithstanding the assurances given Victoria Smith when she transferred jobs at a pay cut, and despite the fact that her job description called only for non-technical duties, Charles Baskin decided that she would, on a permanent basis, relieve his secretary in the morning and again in the afternoon. To this we would add, and whenever else she might be needed, if the past was any indication of the future. Ms. Smith was understandably chagrined and reluctant. Her immediate supervisor was opposed to the assignment; he neither recommended that she accept it nor did he order it. The Personnel Director, Gary L. Otting, found the assignment inconsistent with her job description.

Director Baskin worked his will. He decreed that Victoria Smith would either do the secretarial duties he assigned or she would be fired. The entire process was prestructured. On January 17 Smith was given a memo from Baskin telling her to report for secretarial relief duties on January 20, "or else." Simultaneously, on January 17 the papers terminating Smith were prepared and signed by the Personnel Director, Baskin, and Charles E. Nemir, Executive Director of the Texas Department of Water Resources. Ms. Smith was in fact discharged before the time arrived for her to perform.

The defendant offered no witnesses although the pretrial order lists Baskin as a witness. He was not called nor did he testify by deposition. One has to ask why. He was the person responsible. Methinks his silence indicated that Baskin had no non-gender-based reason for his action and his superiors well knew it.

Did defendant articulate a legitimate business reason? Was there really an employee RIF or other crunch requiring people to pull in their belts? If so, this record doesn't show it. The trial court and majority conclude that Baskin's demand on Victoria Smith was just reflective of hard times. But was it?

According to uncontradicted testimony, only two people were ever taken out of the Topographic Mapping Section and made to relieve Baskin's personal secretary -- Victoria Smith and her female predecessor, Amy Nevarez. Ms. Nevarez, like Ms. Smith, was hired as an

Engineering Aide III in the Topographic Mapping Section. Unlike Ms. Smith, Amy Nevarez had no secretarial skills. Unable to type, she had to "hunt and peck" to complete labels for the maps. Nonetheless, she was a female, and apparently because Baskin believed females are supposed to be secretaries, he ordered her to relieve his secretary.

The assignment for Ms. Nevarez lasted three to four months, apparently until she transferred to another division. The time was originally supposed to be 30 minutes in the morning and 30 minutes in the afternoon. That didn't last long, as Nevarez testified:

I was told it was going to be 30 minutes in the morning and 30 minutes in the afternoon, then it would be an hour, and then it got to be days.... The ladies would go away on vacation and I would stay there for three days, whole days.

Most telling of all, no male Engineering Aide II was ever called to relieve Baskin's secretary. Even if hard times did require a fill-in from the technical staff, no male, even one who could type, was ever considered for the job. In the myopic, gender-prejudiced eye of division director Baskin, being a secretary is not a male duty, it is exclusively in the domain of the ladies.

The trial court found that males routinely relieved Baskin's secretary. The record lends no support to that finding. Bill Caskey was Baskin's assistant. Caskey's desk was next to Baskin's secretary; in fact she was secretary for both of them. Caskey performed the "routine" male relief work that the trial court found so significant. It appears that on some afternoons when Baskin's secretary left the office for a few minutes around 4:30 p.m. to take late mail to the mailroom, Caskey answered the telephone if it rang. Bully for Caskey!

I am not persuaded that the defendant articulated a legitimate business reason for Baskin's actions, but even if it did, the evidence overwhelms that it was pretextual. I read this record as reflecting a classic example of "backing and filling."

Smith was discriminated against *because* of her sex. She was ordered to do a job *because* of her sex. She was reluctant, but never specifically declined. Each time she was approached she demurred and asked for more time to think about it. Nonetheless she was fired, ostensibly for insubordination. Moreover, despite this "insubordination," remarkably

her record was marked that she was eligible for rehiring. The Personnel Director know of *no* other person who was *ever* fired who was also marked for rehire by the agency, nor did the Personnel Director know of any other termination where, as here, the first-line and second-line supervisors were not involved in the decision.

Baskin is no longer with the agency. Dr. Tommy Ray Knowles is the new Division Director. His secretary is relieved daily by other secretaries. No technical people, male or female, are pulled from their jobs. This demonstrates to me the clearly erroneous nature of the trial court's conclusion that "Ms. Smith failed to present *any* evidence establishing that her selection as the person to do the secretarial relief work in Mr. Baskin's office was based on her sex."

Moreover, the trial court erred in its application of Title VII, finding that Baskin could discriminate against Smith simply because she was a new, "probationary," employee. Curiously, the court found that, "[h]ad Defendant desired to discriminate against women, it simply would not have hired Plaintiff." This ignores the statute and vast body of caselaw recognizing discriminatory acts and practices outside the hiring process. 42 U.S.C. § 2000e-2. ¹

The evidence is undeniable that because of her sex Baskin assigned the secretarial duties to Smith, rather than any other technical employee. This violates Title VII. See *Futran v. RING Radio Co.*, 501 F.Supp. 734, 741 (N.D.Ga.1980) (Radio station violated Title VII by asking female talk show host "to add to her job essentially clerical duties that males were not similarly requested to perform and in the retaliatory termination of her employment when she protested the assignment of clerical duties as discriminatory.")

The defendant would make much of the fact that Smith was discharged because she refused an assignment. Counsel argued that she should have worked as ordered and then complained. That argument misperceives Title VII. The fact that Smith did not cheerfully accede to improper demands is of no moment because Title VII proscribes the demands themselves. Moreover, Smith was protected under the opposi-

1. Similarly, the majority's conclusion that Smith should have accepted the assignment and then complained does not accord sufficient weight to the fact that Baskin violated Title VII not only when he fired her, but when he first demanded that she accept secretarial duties.

tion clause of section 704(a), 42 U.S.C. § 2000e-3(a), which proscribes retaliation against employees who oppose their employer's unlawful employment practices:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has opposed any practice made an unlawful employment practice by this title....

See Payne v. McLemore's Wholesale & Retail Stores, 654 F.2d 1130 (5th Cir.1981), *cert. denied*, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 866 (1982); *Armstrong v. Index Journal Co.*, 647 F.2d 441, 448 (4th Cir.1981). In *Payne* we concluded that a plaintiff claiming opposition need not prove that the practice she opposed was indeed unlawful, just that plaintiff had a reasonable belief that it was unlawful. An employee who resists unlawful conduct may not be sanctioned for that resistance. Congress apparently thought that to permit such would turn Title VII on its head. I totally agree.

The majority distinguishes this case from *Payne* and *Armstrong* by claiming that Baskin fired Smith because she rejected efforts to "seek a solution to the problem," and not because she complained of his discriminatory acts in forcing her to accept secretarial duties. The proffered solution consisted of a vague suggestion that Smith would be transferred from the secretarial duties as soon as possible. If the past was any indication, she would have been performing secretarial duties for Baskin indefinitely. I understand the opposition clause to bar an employer from firing a person because she objected to a discriminatory job assignment.

Nor is this a case where, as the majority suggests, Smith's conduct so interfered with her legitimate duties that she became ineffective in the job for which she was employed. *See Payne*. Smith's reluctance to accept the secretarial duties amounted to silent opposition. This was not "insubordinant, disruptive, or nonproductive behavior" by any measure. *See Armstrong*.

Moreover, Smith should not now be penalized for not filing an immediate claim with the EEOC. I do not expect an aggrieved employee to act with the legal skills of a lawyer acting with the benefit of hindsight.

I am persuaded that under our appellate responsibilities, as defined by Rule 52(a) and *Anderson* and other cases, unless we are ready to abandon all appellate factual review, we should reverse in this case. The trial court's factual findings are clearly erroneous. Further, it erred in its

application of the law. Victoria Smith could not be fired for declining to accept gracefully that which Title VII forbade her employer to do, *i.e.*, discriminate against her because of her sex. I disagree with my brothers of the majority and respectfully dissent.

- B-1 -

**VICTORIA A. SMITH,
on behalf of herself and all others similarly situated,**

Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF WATER RESOURCES, ET AL.,

Defendants-Appellees

No. 85-1453

**United States Court of Appeals,
Fifth Circuit.**

September 15, 1986

**Before: Thomas M. Reavley and Henry A. Politz, Circuit Judges,
and George P. Kazen*, District Judge.**

Opinion by Judge George P. Kazen

**Appeal from the United States District Court
for the Western District of Texas
Walter S. Smith, Jr., District Judge, Presiding**

OPINION

GEORGE P. KAZEN, District Judge:

Victoria A. Smith brought suit against her former employer, the Texas Department of Water Resources ("TDWR") and its Executive Director, Charles E. Nemir, in his official capacity, alleging that her discharge from employment was a result of sex discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.*¹ After trial to the

*District Judge of the Southern District of Texas, sitting by designation.

1. Smith also originally sued Charles R. Baskin, the protagonist in this case, but voluntarily dismissed him prior to trial. Baskin did not testify at the trial, either in person or by deposition.

court, judgment was rendered for the Defendants based on written findings of fact and conclusions of law. Because the findings lack the required specificity to permit effective appellate review, we vacate the judgment and remand for further proceedings.

I. Background

Smith's evidence reflected that at the time of her discharge in January, 1983, she was employed by TDWR as an Engineering Aide II in the Topographic Mapping department (Topo'Mapping) of the Data and Engineering Services Division. She had first been employed as a secretary at TDWR in September 1982, but applied for the engineering aide's position when a vacancy was posted in October 1982. She applied even though the aide's position would initially pay less than her secretarial position. Smith wanted to transfer because of her technical background, including a Bachelor of Science degree in photography, and her perception that a technical career offered more long-term opportunity for advancement than did a secretarial position. While interviewing for the new position, she sought and obtained assurance from TDWR's interviewer that the position was indeed a technical one, not involving secretarial duties. This assurance also conformed to the written job description furnished by TDWR. Smith was selected for the aide's position effective November 22, 1982.

On January 13, 1983, Smith was asked to report to Charles R. Baskin, the then-Director of the Division, at his office on another floor. Baskin requested of Smith "a favor," namely that she relieve Baskin's secretary on a daily basis. This relief duty was to be permanent, consisting of 30 minutes each morning and afternoon. Smith was skeptical of the latter aspect, because on one previous occasion she had agreed to relieve Baskin's secretary for 20 minutes but was kept for 3 hours. She also felt that she was being channeled back into the secretarial field from which she had so recently taken affirmative steps to leave. Moreover, the aide's position, unlike that of a secretary, was one in which the employee's production was measured. To the extent that Smith would be performing secretarial duties outside her department, she felt her measurable production in the aide's job and therefore her job evaluations would be adversely impacted.

Smith did not initially refuse Baskin's request but asked for time to think about it. She then received from Baskin a memo dated January 17,

1983, stating that the prior request for Smith to perform secretarial duties was now an assignment effective January 20, 1983, and that refusal to accept this assignment would constitute grounds for immediate termination. On January 20, Baskin called Smith to ask if she were going to relieve his secretary that day. When she replied that she needed more time to think about it, Baskin hung up. Smith attempted to telephone Baskin that afternoon, without success, and he did not return her call. Smith was next contacted on January 31, 1983, when she was handed her termination notice. No one was hired to replace Smith as an engineering aide, and Baskin's secretary was thereafter relieved by other secretaries.

Emil Blomquist, Smith's immediate supervisor in Topo'Mapping, testified that the only other employee from that department ever requested to do secretarial relief work was Amy Nevarez, who was also the only other female employed in Topo'Mapping prior to Ms. Smith. None of the prior male employees in Topo'Mapping was ever asked to perform secretarial relief work. Blomquist also testified that it was unusual procedure for Baskins to make a direct work assignment to someone in Blomquist's section, and that he regarded Smith's secretarial assignment as unreasonable. Blomquist considered Smith to be a good, dependable employee and was not consulted about the decision to fire her. Blomquist also described as insubordinate a male employee who preceded Ms. Smith and Amy Nevarez; Baskin took no disciplinary measures against this male employee and in fact he was later given a merit raise.

Bobbie Critendon was Blomquist's supervisor and Smith's "second-line supervisor." He likewise did not participate in the decision to fire Smith and was unaware of any other incident in the TDWR where neither the first-line nor second-line supervisor participated in a decision to discipline an employee. In a written evaluation of December 1982, Critendon stated that Ms. Smith was "becoming an outstanding employee" and at trial stated she was virtually a "model employee." Critendon likewise could not recall any male employee from Topo'Mapping ever being requested to perform secretarial duties.

Gary L. Otting, TDWR's Director of Personnel, acknowledged that secretarial work was not related to the job description for an Engineering Aide and stated that no person in the agency had authority to unilaterally rewrite a job description. Baskin had approved and signed the Engineering Aide's job description before it was posted and had the opportunity to give input about its contents. The description makes no reference to

secretarial duties, although it does provide that the aide may "[a]ssist in other Division programs as needed."

Finally, Amy Nevarez testified that while employed as an Engineering Aide, she had been requested to do secretarial relief work for Baskin although she could not type and had no secretarial skills.

Defendants called no witnesses, but developed their case through cross-examination of Plaintiff's witnesses. Their evidence indicated that at least one other male employee, albeit not from Topo'Mapping, "routinely" relieved secretaries although it was not part of his job description; that the predecessor male employee mentioned by Blomquist had never been insubordinate; that performing part-time secretarial duties would not adversely impact Smith's future performance evaluations; and that Baskin did have authority to change an employee's job description. Defendants also elicited testimony suggesting that budgetary pressures and staff reductions required the agency to be "flexible" and demanded that the Director modify individual assignments to meet the needs of the agency. It was further established that, because she had been employed at TDWR less than six months, Smith was considered to be on "probationary status."

This evidence obviously could lead to sharply conflicting conclusions. Plaintiff described a model female employee, having recently transferred from a secretarial to a technical position at personal cost, unnecessarily re-assigned to secretarial duties contrary to her job description and agency procedures, which duties were never required of male employees, and summarily fired for balking at the assignment. Defendants saw an insubordinate probationary employee who refused to perform a direct job assignment, placing her personal preferences above the needs of the employer. Deciding between these two versions would require resolution of several key fact questions, including: were male employees in technical positions ever required to perform secretarial duties on a regular basis? Did legitimate budgetary or personnel problems prompt Smith's secretarial assignment? Did Baskin violate agency policies in deciding to assign Smith or to subsequently fire her? Was a male predecessor to Ms. Smith undisciplined for similar conduct? Would the part-time secretarial work adversely affect Smith's job evaluations, a disadvantage not imposed upon male employees? Unfortunately none of these questions were answered by trial court.

II. Trial Court's Findings and Conclusions.

The Court made seven findings of fact, four of which pertained to uncontested jurisdictional and background facts. The only three findings arguably addressing the contested issues were:

4. During the period of her employment as an Engineering Aide III, Plaintiff performed her job in a satisfactory manner and did not violate the conditions of probation, other than refusing to provide secretarial relief as requested.

5. On January 13, 1983, Plaintiff was orally requested to perform secretarial work for approximately ½ hour per morning and ½ hour per afternoon. On January 17, 1983, Plaintiff received the same request in the form of a written work assignment, advising her that if she refused the assignment, her refusal would be grounds for termination.

6. Plaintiff was terminated from her position as Engineering Aide III, for failure to report for part-time secretarial duties. At this time, she was still a probationary employee.

The Court made nine conclusions of law. Four did not relate to any contested issue. In the remaining five conclusions, the trial court first held that the Plaintiff had failed to establish a *prima facie* case of discriminatory discharge because "she has failed to establish that she was discharged for a non-valid, discriminatory reason. The Defendant has not sought applicants for the position vacated by Plaintiff." The Court then added:

4. Assuming, *arguendo*, that Plaintiff did establish her *prima facie* case, Defendant has articulated a valid business reason for discharging Plaintiff, namely, that she refused and failed to perform part-time secretarial relief work as was requested.

5. Plaintiff has failed to prove Defendant's reason for her discharge was pretextual. The Defendant had the right to terminate probationary employees at will.

6. Defendant's decision to terminate Plaintiff was not motivated by her sex. The Court finds any evidence to the contrary not to be credible.

7. There is no credible evidence of disparate treatment of Plaintiff based upon her sex.

III. Discussion.

[1] It is evident that the trial court's fact findings simply recite bare historical events that were essentially undisputed, viz that Plaintiff was hired as an engineering aide, generally performed satisfactorily, was then requested to perform secretarial relief work, and was terminated for failing to do so. The findings do not even address the real issue of whether Plaintiff's continued employment was conditioned upon a "women only" assignment, to the detriment of her technical position. The conclusions of law, alternatively adopted as fact findings, add little more.

[2] The conclusion that Plaintiff failed to establish "a prima facie case" appears to be based on the finding that TDWR did not seek applicants for the position vacated by Plaintiff. While this may be an element in the normal discharge case, *Jackson v. City of Killeen*, 654 F.2d 1181, 1183 (5th Cir. 1981), the facts necessarily vary in Title VII cases and the normal requirements of a prima facie case are "not necessarily applicable in every respect to differing factual situations." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.14 (1973). Here the essence of Plaintiff's complaint was not that the employer chose to substitute a male for a female engineering aide; instead it was that male engineering aides were historically allowed to perform their legitimate duties while female aides were required to also serve as part-time secretaries. From that perspective, Plaintiff clearly established a prima facie case. More importantly, at the conclusion of Plaintiff's case, Defendants' motion for dismissal was denied. Defendants thereupon rested, presumably satisfied they had made their case on cross-examination of Plaintiff's witnesses. Nevertheless they were afforded the opportunity to offer evidence. When the Defendant "fails to persuade the district court to dismiss the action for lack of a prima facie case" and the case is thus "fully tried on the merits," the true issue becomes whether the plaintiff has proved the ultimate question of discrimination; whether plaintiff properly made a prima facie case "is no longer relevant." *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 714-15 (1983).

The statement in the trial court's Conclusion No. 5 that TDWR had the right to terminate probationary employees at will is also problemati-

cal. If it is intended as a justification for the companion statement that Plaintiff failed to prove pretext, it is incorrect. The concept of a probationary employee, often critical in a due process discharge case, has little relevance in a Title VII case. The complex statutory scheme prohibiting employment decisions based on an individual's race, color, religion, sex or national origin cannot be avoided by classifying employees as "probationary."

[3] What remains of the trial court's findings and conclusions is simply the statement that Plaintiff's failure to perform part-time secretarial relief work was "a valid business reason" for her discharge, and that any contrary evidence of sex discrimination is not credible. This is inadequate.

[4] Federal Rule of Civil Procedure 52(a) requires the trial court to "find the facts specially." The findings must be explicit enough to allow for appellate review:

"If the trial court believes the employer's explanation of its motivation, the courts may not merely state, in conclusory terms, that the plaintiff has failed to prove the employer's suggested reason to be a pretext for invidious discrimination or that there is no evidence of discriminatory treatment. It must at least refer to the evidence tending to prove and disprove the merits of the proffered explanation and state why the court reached the conclusion that the explanation has not been discredited."

Ratliff v. Governor's Highway Safety Program, 791 F.2d 394, 400 (5th Cir. 1986).

As stated in *Redditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1386 (5th Cir. 1983):

"In reviewing the district court's finding of no discrimination under the clearly erroneous standard, this Court cannot be left to second guess the factual basis for the district court's conclusion. This Court cannot determine whether the district court's finding that plaintiff failed to demonstrate pretext was clearly erroneous when the district court's finding is not expressed with sufficient particularity. It is not the function of this Court to make credibility choices and findings of fact."

[5] We must therefore remand this case to district court for further findings. After reviewing the evidence, the district court is obvious "free to change, modify, or reassert" its conclusion on the ultimate question of discrimination *vel non*. *Id.* at 1386.

The judgment is VACATED, and the cause REMANDED for the limited purpose of making further findings. The supplemental record will then be referred to this panel which retains jurisdiction except for the limited remand.

VICTORIA A. SMITH,

Plaintiff,

v.

TEXAS DEPARTMENT OF WATER RESOURCES, ET AL.,

Defendants

Civil Action No. A-83-CA-574

United States District Court
For the Western District of Texas
Austin Division

**SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

This case came on for trial on April 15, 1985, before the Court without a jury. Having considered the evidence, arguments and written briefs filed herein, the Court now makes supplemental findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff is a female citizen of the United States and, therefore, a member of a protected class.

2. Plaintiff has satisfied the procedural requirements of her Title VII claim and the Texas Department of Water Resources is an employer as defined in that act.

3. Plaintiff was hired by Defendant, an agency of the state of Texas, on September 14, 1982 in a temporary position. On November 22, 1982, Plaintiff was hired by Defendant as an Engineer Aide III in the Topographic Mapping Section of Defendant's Austin headquarters offices in a regular, permanent position, with a six month probationary period.

4. During the period of her employment as an Engineering Aide III,

Plaintiff performed her job in a satisfactory manner and did not violate the conditions of probation, other than refusing to provide secretarial relief as requested.

5. Ms. Smith's primary duties as an Engineer Aide III in the "map room" consisted of filing requests made by members of the public or state agencies for maps maintained by TDWR.

6. On January 13, 1983, C. R. Baskin, Director of the Data and Engineering Services Division of TDWR, held a discussion with Plaintiff Smith in which he requested that she assist his office in providing relief to the Division Secretary twice daily for a period of approximately one-half hour in the morning and the same amount of time in the afternoon. During that discussion, Ms. Smith indicated that she was unwilling to perform the duties described. She indicated a strong desire to get away from secretarial work and pointed out that when she applied for the Engineering Aide III position she did not understand it to include any secretarial duties. During that discussion, Mr. Baskin pointed out to Ms. Smith that although the job posting for the Engineering Aide III position did not specifically include relief secretarial assignments, it did require that she "assist in order division programs as needed."

7. During the same time in which Plaintiff was being asked to provide Mr. Baskin assistance in relieving his secretary, Mr. Bill Caskey, Assistant Director of the Data and Engineering Service Division, routinely performed daily relief services for Mr. Baskin's secretary during the agency's 4:00 p.m. mail run.

8. During that period in which the Plaintiff was asked to perform relief services, the TDWR was experiencing budgetary cutbacks and a twenty percent reduction in its personnel force. These budget and personnel shortages required Mr. Baskin to look for more efficient, flexible means of relieving Division secretaries.

9. The addition of relief duties to Plaintiff's activities in the map room was a reasonable, non-discriminatory decision by Mr. Baskin in light of legitimate personnel and budgetary constraints in the Data and Engineering Services Division, and TDWR.

10. The decision to add relief duties to Plaintiff's map room activities was within Mr. Baskin's discretion and was not violative of TDWR

policies.

11. On January 17, 1983, Mr. Baskin sent Ms. Smith a memorandum in which he made it clear that he was in fact assigning the relief secretarial duty to Ms. Smith as of January 20, 1983. Further, he advised her that, if she refused to accept this work assignment and to carry it out in an efficient and expeditious manner, her refusal would be grounds for termination.

12. On January 20, 1983, Ms. Smith failed to relieve the Divisional Secretary during the morning as she was required to do. Mr. Baskin called her up to ask her why she had not reported to his office to relieve his secretary in the morning and again instructed her that she was required to be there in the afternoon.

13. About 1:00 p.m. on January 20, 1983, Mr. Tommy Knowles called Bobbie Critendon (the Chief of Data Collection and Evaluation) and Ms. Smith into his office and instructed Ms. Smith to report to Mr. Baskin's office at 2:30 that afternoon. He also informed Ms. Smith that her failure to do so would result in her termination. In the afternoon of January 20, 1983, Ms. Smith again failed to report to Mr. Baskin's office as instructed. At the time of this failure to report, Plaintiff was still a probationary employee.

14. Mr. Charles Nemir, Executive Director of TDWR, told Plaintiff that if she would assist Mr. Baskin as requested, Mr. Nemir would instruct the personnel office to find Ms. Smith a lateral transfer to a technical position in a division where she would not be needed to do secretarial relief. Ms. Smith, however, insisted on keeping "her job" in the "map room" and declined Mr. Nemir's offer to accommodate her by finding her a different but comparable technical position.

15. Plaintiff's male predecessor, Bill Gutierrez, failed on several occasions to adequately perform routine tasks in the map room, but TDWR did not think him "insubordinate" for his failures.

16. Mr. Gutierrez was a non-probationary employee at the time of his failure to perform certain map room tasks. Mr. Gutierrez was never disciplined by TDWR for his failure to perform certain map room tasks.

17. Performance by the Plaintiff of the relief duties which Mr. Baskin

requested of her would not have adversely effected her job evaluations.

18. Amy Navarez, a female, had been the first female Engineering Aide III in the Topographic Mapping Section of TDWR. Had Defendant desired to discriminate against women, it simply would not have hired Plaintiff.

19. At least two other similarly situated male employees, Bill Caskey and Emil Blomquist, had performed temporary secretarial duties.

20. TDWR is a relatively small state agency having a need for some flexibility in its job assignments. The Court takes notice of the fact that in the general population, more women than men have and maintain secretarial skills.

21. There is no credible evidence that the Defendant or any of its supervisors ever discriminated against anyone on the basis of sex. If Plaintiff was treated poorly or unfairly or even without due process, none of which the Court finds to be true, such treatment was in no way related to her sex.

22. The Defendant's non-discriminatory reasons for terminating Plaintiff were not pretextual.

CONCLUSIONS OF LAW

1. TDWR is an employer within the meaning of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e *et seq.*

2. This Court has jurisdiction over the subject matter and the parties in this action pursuant to 28 U.S.C. § 1331, § 1343(3) and § 1340(3) and (4), as well as 42 U.S.C. § 2000e(3).

3. In order for Plaintiff Smith to establish her prima facie case of discriminatory discharge, she must prove by a preponderance of the evidence that she was (1) a member of a protected class; (2) that she was discharged under circumstances which indicate that she was discriminated against; (3) that the discharge was not for a valid reason; and (4) that TDWR sought applicants for the vacant position. *Carroll v. Sears, Roebuck and Company*, 708 F.2d 183, 196 (5th Cir. 1983); *Thompson v. Leeland Police Department*, 633 F.2d 1111, 1114 (5th Cir. 1980). Although

it is undisputed that Ms. Smith is a member of a protected class (female) and that she was discharged, she failed to establish that her discharge was not for a valid reason. Although she alleged that she was discharged because of her sex, she failed to present evidence substantiating this allegation. Further, TDWR did not and still has not sought applicants for the position vacated by Ms. Smith's termination.

4. Even if Ms. Smith had met her burden of establishing her prima facie case, TDWR rebutted that claim by articulating a legitimate, non-discriminatory reason for Ms. Smith's termination. *Thompson, supra*, *Ray v. Freeman*, 626 F.2d 439 (5th Cir. 1980); *Turner v. Texas Instruments, Inc.*, 555 F.2d 1251 (5th Cir. 1977). TDWR did so by demonstrating that Ms. Smith was terminated because she refused to report to Ms. Baskin's office to relieve his secretary on January 20, 1983, as repeatedly instructed to do. The evidence presented by TDWR also conclusively established that Ms. Smith was repeatedly informed that her failure to do so would be grounds to terminate her as a probationary employee.

5. Although Ms. Smith had an opportunity to show that TDWR's explanation was a pretext for discrimination, *See, Thompson, supra; Ray, supra; Turner, supra*; Ms. Smith failed to do so.

6. At trial, Plaintiff also sought to establish that Mr. Baskin's assignment of her to relief secretarial duties itself constituted a cognizable claim of sexual discrimination under Title VII. Although the Fifth Circuit has recently recognized a "channeling" claim under Title VII, *See, Carpenter v. Stephen F. Austin*, 706 F.2d 608 (5th Cir. 1983), this Court is without jurisdiction to hear Ms. Smith's "channeling" claim. This is so because the scope of Ms. Smith's judicial complaint is limited by the scope of the claim she made before the EEOC. *Vuyanich v. Republic National Bank of Texas*, 723 F.2d 1195 (5th Cir. 1984); *Terrell v. United States Pipe and Foundry Co.*, 644 F.2d 1112 (5th Cir. 1981); *Tillman v. City of Boaz*, 548 F.2d 592 (5th Cir. 1977); and *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970). Ms. Smith's EEOC charge did not include a channeling claim.

7. However, even if Ms. Smith's "channeling" claim were properly before this Court, she failed to establish her prima facie case. The Fifth Circuit made clear in *Carpenter* that a channeling claim is to be treated as a disparate treatment claim which requires a showing of intentional discrimination. In this case, Ms. Smith failed to present any evidence

establishing that her selection as the person to do the secretarial relief work in Mr. Baskin's office was based on her sex.

8. Further, TDWR articulated a legitimate, non-discriminatory reason for choosing Ms. Smith. She was chosen not only because she had the skills necessary to do the relief work, but also because the needs of the "map room" were the least demanding and lowest priority within the department and therefore Ms. Smith could be pulled from the map room to do the secretarial work without undermining the essential functions of the agency. TDWR's reasoning is supported by the following three facts in evidence: (a) the fact that Ms. Smith's predecessor was pulled out of the map room on occasion to do relief secretarial work for Mr. Baskin, as well as other work out in the field; (b) the fact that after Ms. Smith was terminated, TDWR found it unnecessary to refill that position; and (c) Ms. Smith's own testimony indicates that during the entire time that she worked in the map room she completed all of the map requests made in the same day received with there never being a backlog of requests pouring into the next day.

9. Finally, although in this case Ms. Smith had the opportunity to demonstrate that TDWR's reasoning was a pretext for discrimination, she failed to do so.

SIGNED this 7th day of November, 1986.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

- D-1 -

VICTORIA A. SMITH,

Plaintiff,

v.

TEXAS DEPARTMENT OF WATER RESOURCES, ET AL.,

Defendants

Civil Action No. A-83-CA-574

**United States District Court
For the Western District of Texas
Austin Division**

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law heretofore entered in this cause, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff, VICTORIA A. SMITH, take nothing in her suit against Defendant, TEXAS DEPARTMENT OF WATER RESOURCES, ET AL.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that costs of Court are hereby assessed against each party incurring same.

SIGNED and ENTERED this 19th day of June, 1985.

**WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE**

VICTORIA A. SMITH,

Plaintiff,

v.

TEXAS DEPARTMENT OF WATER RESOURCES, ET AL.,

Defendants

Civil Action No. A-83-CA-574

United States District Court
For the Western District of Texas
Austin Division

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial on April 15, 1985, before the Court without a jury. Having considered the evidence, arguments and written briefs filed herein, the Court now makes findings of fact and conclusions of law.

Plaintiff, VICTORIA A. SMITH, sues the TEXAS DEPARTMENT OF WATER RESOURCES, ET AL., to redress alleged violations of the employment discrimination provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, as amended.

FINDINGS OF FACT

1. The Court has jurisdiction of this cause under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* Plaintiff has satisfied the procedural requirements of her Title VII claim and the Texas Department of Water Resources is an employer as defined in that act.

2. Plaintiff is a female citizen of the United States and, therefore, a member of a protected class.

3. Plaintiff was hired by Defendant, an agency of the state of Texas, on

September 14, 1982 in a temporary position. On November 22, 1982, Plaintiff was hired by Defendant as an Engineer Aide III in the Topographic Mapping Section of Defendant's Austin headquarters offices in a regular, permanent position, having a six month probationary period.

4. During the period of her employment as an Engineering Aide III, Plaintiff performed her job in a satisfactory manner and did not violate the conditions of probation, other than refusing to provide secretarial relief as requested.

5. On January 13, 1983, Plaintiff was orally requested to perform secretarial relief work for approximately ½ hour per morning and ½ hour per afternoon. On January 17, 1983, Plaintiff received the same request in the form of a written work assignment, advising her that if she refused the assignment, her refusal would be grounds for termination.

6. Plaintiff was terminated from her position as Engineering Aide III with the Texas Department of Water Resources on January 31, 1983, for failure to report for part-time secretarial duties. At this time, she was still a probationary employee.

7. Within 180 days after being notified that she was being terminated, Plaintiff filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC). A "Right to Sue" letter was issued by the U.S. Department of Justice to Plaintiff on August 4, 1983; this suit was filed within ninety (90) days thereafter, on October 21, 1983.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this suit pursuant to 28 U.S.C. § 1331, 1340(3) and (4), as well as 42 U.S.C. § 2000e-(3).

2. Defendant Texas Department of Water Resources is an employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*

3. In order for Plaintiff to prevail, she must prove the following elements by a preponderance of the evidence:

1. That she is a member of a protected class;

2. That she was discharged in a manner that indicates discriminatory motive;
3. That the discharge was not for a valid reasons; and
4. That Defendant sought applicants for the vacant position. *Carroll v. Sears, Roebuck and Co.*, 703 F.2d 183 (5th Cir. 1983); *Thompson v. Leeland Police Department*, 633 F.2d 1111 (5th Cir. 1980).

Plaintiff is a member of a protected class, a female, and she was discharged. However, she has failed to establish that she was discharged for a non-valid, discriminatory reason. The Defendant has not sought applicants for the position vacated by Plaintiff. Accordingly, Plaintiff has not established a prima facie case of discriminatory discharge.

4. Assuming, *arguendo*, that Plaintiff did establish her prima facie case, Defendant has articulated a valid business reason for discharging Plaintiff, namely, that she refused and failed to perform part-time secretarial relief work as was requested.

5. Plaintiff has failed to prove Defendant's reason for her discharge was pretextual. The Defendant had the right to terminate probationary employees at will.

6. Defendant's decision to terminate Plaintiff was not motivated by her sex. The Court finds any evidence to the contrary not to be credible.

7. There is no credible evidence of disparate treatment of Plaintiff based upon her sex.

8. There is no credible evidence that any of Defendant's policies, rules, regulations or actions had a disparate impact on women as a protected class.

9. All findings of fact incorrectly denominated as conclusions of law are hereby adopted as findings of fact. All conclusions of law incorrectly denominated as findings of fact are hereby adopted as conclusions of law.

SIGNED and ENTERED this 19th day of June, 1985.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

**VICTORIA A. SMITH,
on behalf of herself and all others similarly situated,**

Plaintiff-Appellant,

v.

**TEXAS DEPARTMENT OF WATER RESOURCES,
Etc., ET AL.,**

Defendants-Appellees.

No. 85-1453

United States Court of Appeals for the Fifth Circuit

**Appeal from the United States District Court
For the Western District of Texas**

ON PETITION FOR REHEARING

JULY 1, 1987

Before REAVLEY and POLITZ, Circuit Judges, and KAZEN*,
District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above
entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

Judge Politz dissents from the denial
of the petition for rehearing.

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| U.S. CIVIL SERVICE COMMISSION FORM 105-11 (REV. 11-31-81) | CHARGE OF DISCRIMINATION IMPORTANT: This form is affected by the Privacy Act of 1974, and Privacy Act Statement on reverse before completing it. | CHARGE NUMBER(S) (AGENCY USE ONLY) <input checked="" type="checkbox"/> STATE/LOCAL AGENCY FA-SHC-63-105 <input checked="" type="checkbox"/> EEOC 16583665 |
|--|--|--|

1. **Employment Opportunity Commission and**

2. **Relations Commission** (State or Local Agency)

3. **Victoria A. Smith**

4. **6 Bonham Terrace**

5. **Stin, Texas 78704**

6. **ED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR CAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one, list below)**

7. **was Department of Water Resources**

8. **00 North Congress Avenue**

9. **Austin, Texas 78711**

10. **OFF ADDRESS**

11. **RE OF DISCRIMINATION BASED ON MY OTHER EMPLOYER(S) RECORDS**

12. **DISCRIMINATION BASED ON MY OTHER EMPLOYER(S) RECORDS**

13. **IF MUST RECENT OR CONTINUING DISCRIMINATION TOOK**

14. **1-20-83**

15. **PERSONAL HARM**

16. **CHARGE:** - I was discharged from my position as an Engineering Aide III on or about 1-20-83.

17. **WORK HISTORY:** - I began my employment on or about September 14, 1982, as a Secretary III.
- I was employed for a period of five and one half months (5-1/2)

18. **REASONS FOR ADVERSE ACTION**
CHARGE: - Mr. C. E. Baskin, male Division Director of the Data and Engineering Services, told me I was being discharged because of insubordination.

19. **STATEMENT OF DISCRIMINATORY ACT:** I believe I have been discriminated against cause of my sex/female, in that:

20. **CHARGE:**

- I believe that my discharge was not warranted in that I was discharged because I questioned Mr. Baskin about additional secretarial duties which drastically deviated from my position as an Engineering Aide III.
- In fact, I was given an ultimatum by Mr. Baskin to provide secretarial relief help to his secretary or be terminated.
- Male Engineering Aides in the past such as Jimmy Tinsley, James Werhan, Glen Marschbrock, John Ellis and Mike Crouch, have never been required nor compelled to do secretarial work which deviated from their job description. They were not similarly discharged as I was.
- I believe, therefore, that sex was a factor taken into consideration in my discharge.

21. **and advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my change in accordance with their procedures.**

22. **Victoria A. Smith**

23. **before under penalty of perjury that the foregoing is true and correct.**

24. **Victoria A. Smith**

25. **January 31, 1983** CHARGING PARTY (Signature)

26. **PREVIOUS EDITIONS OF ALL EEOC FORMS ARE OBSOLETE AND MUST NOT BE USED.**

| | |
|--|---|
| 27th day of January, 1983 Signed by Victoria A. Smith Printed name Victoria A. Smith | 28. RECEIVED 29. FILED 30. DATE 31. TIME 32. PLACE |
|--|---|



JAN 20 1988

JOSEPH F. SPANIOL, JR.,
CLERK

2
NO. 87-522

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987**

VICTORIA A. SMITH,
Petitioner

V.

**TEXAS DEPARTMENT OF WATER RESOURCES
AND
THE EXECUTIVE DIRECTOR OF THE
TEXAS DEPARTMENT OF WATER RESOURCES,**
Respondents

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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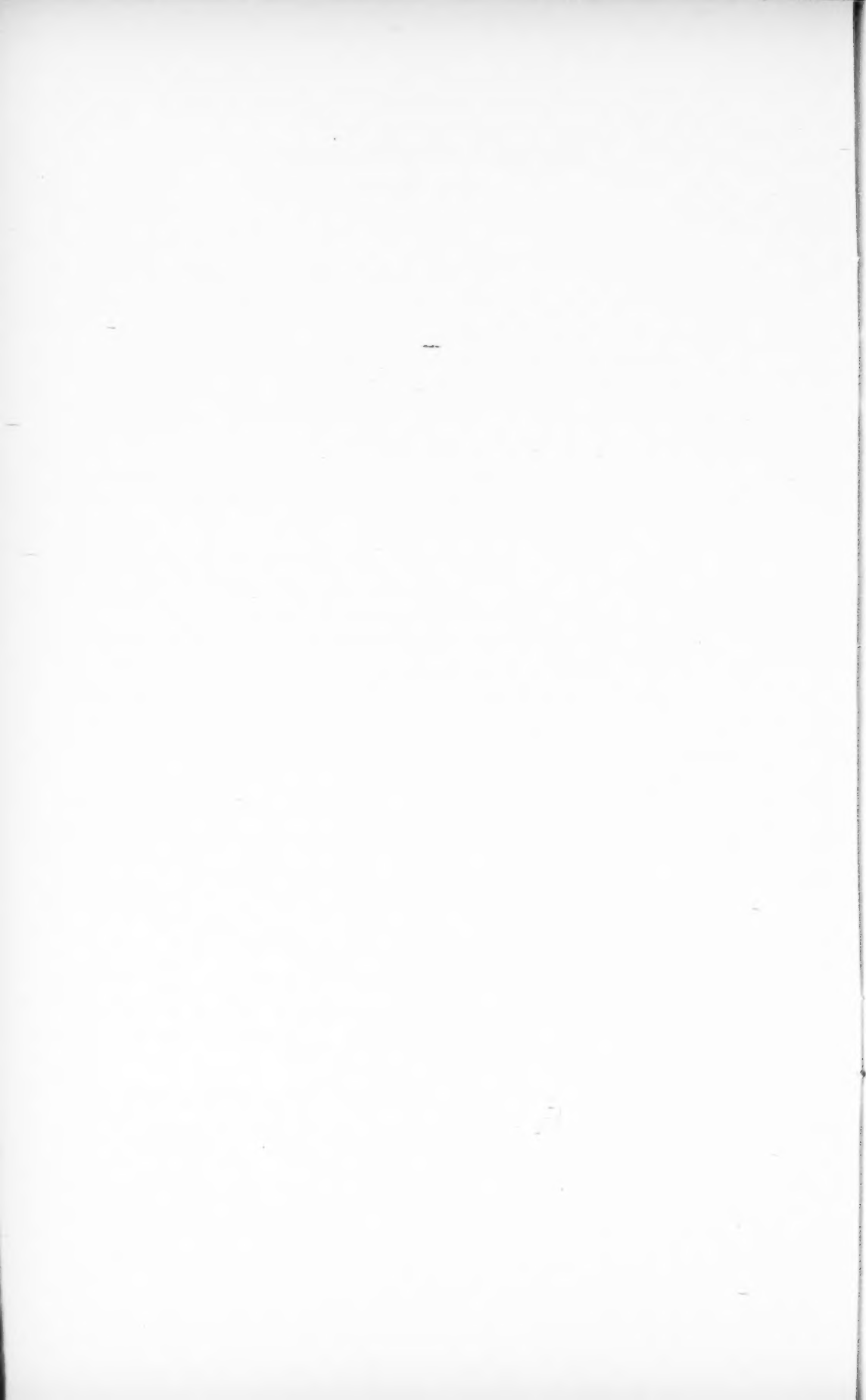
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NO. 87-522

**IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987**

VICTORIA A. SMITH,
Petitioner

V.

**TEXAS DEPARTMENT OF WATER RESOURCES
AND
THE EXECUTIVE DIRECTOR OF THE
TEXAS DEPARTMENT OF WATER RESOURCES,**
Respondents

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

**TO THE HONORABLE JUSTICES OF THE
SUPREME COURT:**

NOW COME the Texas Department of Water Resources and its Executive Director, Respondents, through their attorney of record, the Attorney General of the State of Texas, and file this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Victoria A. Smith brought suit against her former employer, the Texas Department of Water

Resources ("TDWR"), and its Executive Director, Charles E. Nemir, in his official capacity, alleging that her discharge from employment was an illegal retaliation for her opposition to a discriminatory employment action, and so was in violation of §704(a) of Title VII, the Civil Rights Act of 1964, 42 U.S.C. §2000e-3(a).

Finding the district court's version of the evidence plausible and hence not clearly erroneous under Fed.R.Civ.P. 52(a), the Fifth Circuit panel recounted that "Smith was directed to perform secretarial relief work ... and refused to do so despite at least two warnings that a refusal would result in termination. She chose this act of insubordination in lieu of complying with the order and challenging it through proper legal procedures." *Smith II*, 818 F.2d 363, 365 (1987).

Smith did not accede because she thought she had advanced beyond secretarial duties. Nevertheless, *someone* was needed to cover when the secretary was away.

The dissent believes that pointedly failing to accept an assigned task is not insubordination. *Smith II*, at 365. The dissent calls it "silent opposition," and would hold such to be protected under §704(a), even though an employee need not be sure that the practice she is opposing is unlawful. *Smith II*, at 365. See, *Payne v. McLemore's Wholesale & Retail Stores*, 654 F.2d 1130 (5th Cir. 1981), cert. denied, 455 U.S. 1000, 102 S.Ct. 1630, 71 L.Ed.2d 86 (1982) (holding that a plaintiff claiming opposition need not prove that the practice she opposed was indeed unlawful, just that plaintiff had a reasonable belief that it was unlawful). The dissent is quite alone here; no opinion from any circuit voices this "silent opposition" view.

Contrary to Petitioner's belief that the Fifth Circuit has in effect rendered all employee opposition unprotected by §704(a), 42 U.S.C. §2000e-3(a), except for filing complaints (see Petitioner's Brief, page 7), the Fifth Circuit panel here explicitly reaffirmed that "picketing activities or other complaints of discrimination" are protected by §704(a). *Smith II*, 818 F.2d at 365.

It is simply false that in the Fifth Circuit §704(a) protects only access to the EEOC and the courts. To do so would be to ignore the "opposition clause" of §704(a) altogether and recognize only the "participation clause". Neither the Fifth Circuit nor any other circuit has so restricted §704(a). Indeed, *Payne's* "reasonable belief" test reveals the degree to which the Fifth Circuit has accommodated complaining employees under §704(a). Petitioner's claim that "the Fifth Circuit apparently requires the employee to demonstrate that the employment practice being opposed is 'immoral, degrading, or dangerous to health.' *Id.*, 818 F.2d at 370." (Petitioner's Brief, page 7). This is completely unfounded. In fact, no such words appear on page 370.

In both *Smith I* and *Smith II* the panel acknowledges that this case is a factually difficult case in which the evidence could easily lead to "sharply conflicting conclusions." *Smith II*, 818 at 364; *Smith I*, 799 F.2d at 1029. There is, however, nothing problematic about the law.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The Circuits are in complete and explicit accord.

Concerning 42 U.S.C. 2000e-3(a), §704(a) of the Civil Rights Act of 1964, Petitioners claim a split among the circuits -- that different and even contravening tests have evolved. Yet Petitioner fails to set before us these allegedly different tests. Petitioner in fact cannot do so because there is no such split among the circuits, no different or contrasting §704(a) tests.

What Petitioner offers instead is a superficial review of a few cases from different circuits in which similar facts allegedly produce different results. A slightly closer look at these cases reveals crucial facts that plainly explain each result. Even if that were not so, however, it would not be surprising to find differences of opinion arising when the central issue is someone's motive: was it retaliation or not? When factfinders must discern motivation and ultimately believe or disbelieve the proffered reasons that Plaintiff alleges are pretext, reasonable minds can reach different conclusions. That is precisely why we leave that and other difficult fact questions to the trial court rather than to an appellate court.

Petitioner, however, points to such differences in fact interpretations and attempts to persuade that they are differences in law: in particular, that different tests have evolved among the circuits. Yet Petitioner can name and explicate only one test: the *Hochstadt* balancing test, found in *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976).

The Fifth and Sixth Circuit, Petitioner acknowledges, employ the *Hochstadt* balancing test in which the court, cognizant of the plain intent of §704(a), and the plain difference between the "opposition clause" and the "participation clause" of §704(a), weighs the employee's interest in voicing opposition to discriminatory practices against the employer's interest in carrying on his business while disputes are dealt with in a fair and proper manner. It should not be surprising when courts rule against the employee who, in expressing his opposition, chooses to bypass or augment established grievance procedures which all agree are fair and satisfactory. How can an employer maintain control of his business when an employee can simply refuse to perform a task because he or she thinks it is discriminatory? There is no opinion from any circuit holding that §704(a) permits that form of opposition. The balancing test fairly and satisfactorily encompasses such issues.

It is simply false that either the Fifth Circuit or the Sixth Circuit reads §704(a) as telling the employee to "Do what you're told, no matter what." (Petitioner's Brief, page 10). Nor does the Sixth Circuit, any more than the Fifth, hold that §704(a) protects only access to the EEOC and the courts, notwithstanding what "Petitioner believes." (Petitioner's Brief, page 8).

Petitioner tries to argue that the Third, Fourth, Seventh and Ninth Circuits use some different test. We are never told, however, what that different test is.

A. The Third Circuit.

From the Third Circuit Petitioner cites *Novotny v. Great American Savings & Loan Assn.*, 584 F.2d

1235 (3rd Cir. 1978), *vacated on other grounds*, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), and *Hicks v. ABT Assocs., Inc.*, 572 F.2d 960 (3rd Cir. 1978), for the proposition that §704(a) protects more than only access to the EEOC and the courts, as if the Fifth and Sixth Circuits disagree. They do not.

Petitioner finds that *Novotny* "suggests" that conduct which is neither illegal nor unreasonably interfered with an employer's legitimate interests would be protected by §704(a). But this is precisely the balancing test. Furthermore, the *en banc* Third Circuit explicitly finds itself in agreement with not only the Fifth Circuit but also the Eighth Circuit in reading the §704(a) "opposition clause" to protect more than merely access to the EEOC and the courts, for the simple reason that the "opposition clause" is distinct from the "participation clause". *Novotny*, 584 F.2d at 1260-61.

Petitioner suggests *Hicks* protects an employee action that is against the interest of the employer, as if the Fifth and Sixth Circuit approach would bar such a result. But of course a balancing test clearly makes room for just such a result; the outcome would depend on the weight of the employee's interest. The *Hicks* court, moreover, simply found that the plaintiff had mistakenly complained to HUD rather than the EEOC. To help explain that mistake, the court mentions that HUD was providing funding for the project on which Plaintiff was working. Contrary to Petitioner's statements, there is no suggestion that the complaint to HUD rather than to EEOC in some way harmed the employer's interests, or that plaintiff in any other way contravened the employer's interest in carrying on his business.

The Third and Fifth Circuits explicitly agree, and both use the balancing test. There is no divergence.

B. The Fourth Circuit.

From the Fourth Circuit Petitioner cites *Armstrong v. Index Journal Co.*, 647 F.2d 441 (4th Cir. 1981), for the proposition that §704(a) protects an employee who refuses an assignment. In fact, the court saw that "her possible refusal ... was not the sole reason" for his dismissal. *Id.* at 448. Rather, the court keyed on the fact that the employer "had previously resolved to fire Armstrong if she continued complaining ... [which] complaints pertained to her segregated job classification, [and] the consequential differential in base pay between a female special salesman and a male regular salesman, ..." *Id.* at 448-49. These are crucial facts, especially disparate pay, that are absent in the case at bar.

Most importantly, in accord with the Fifth Circuit, the Fourth Circuit in *Armstrong* explicitly relies on the First Circuit's *Hochstadt* balancing test. *Id.* at 448. The court explicitly states that "[t]o fall under the protection of the 'opposition clause' in §704(a), behavior need not rise to the level of formal charges of discrimination." Here the Fourth Circuit cites its accord with the Ninth Circuit in *Sias v. City Demonstration Agency*, 588 F.2d 692, 694-96 (9th Cir. 1978). It is also squarely in accord with the Fifth Circuit. To repeat, even the *Smith II* panel notes that other forms of opposition are protected. *Smith II*, 818 F.2d at 365.

Finally, the *Armstrong* court explicitly agrees that "[s]ection 704(a) ... was not intended to

immunize insubordination, disruptive, or nonproductive behavior at work. [citing *Green* and *Hochstadt*]. An employer must retain the power to discipline and discharge disobedient employees." *Id.* at 448 (emphasis added). That, too, is plainly in accord with the Fifth Circuit; it is the basis for the result in *Smith II*, the case at bar.

The Fourth Circuit is solidly in accord with the Fifth and Sixth Circuits on the law of §704(a).

C. The Ninth Circuit.

From the Ninth Circuit Petitioner cites *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008, 1014 (9th Cir. 1983). Even as petitioner sets it out, there is no disagreement here with the Fifth and Sixth Circuits. Indeed, the Ninth Circuit in *Crown Zellerbach* explicitly relies upon the *Hochstadt* balancing test. *Id.* at 1014-16. Moreover, they rely explicitly on the Fifth Circuit's "aptly summarized" version of the *Hochstadt* test, citing *Rosser v. Laborer's Int'l Union of North America*, 616 F.2d 221, 223 (5th Cir.), cert. denied, 101 S.Ct. 241 (1980). "The Fifth Circuit aptly summarized the [*Hochstadt*] doctrine," asking if the opposition was "unreasonable." *Crown*, at 1015.

The Ninth Circuit is solidly in accord with the Fifth and Sixth Circuits on the law of §704(a).

D. The Seventh Circuit.

From the Seventh Circuit Petitioner cites *Mozee v. Jeffboat*, 746 F.2d 365, 373-74 (7th Cir. 1985), and *Jennings v. Tinley Park Community Consol. School Dist.*, 796 F.2d 962, 967-68 (7th Cir. 1986). Again, even as Petitioner sets them out, there is no disagreement here with the Fifth and Sixth

Circuits. Like the Fifth Circuit, the Seventh Circuit requires only that the "plaintiff has a reasonable belief that there is a Title VII violation." *Jennings*, 796 F.2d at 967. Like the Fifth, First and Fourth Circuits, the Seventh Circuit explicitly relies on the *Hochstadt* balancing test, remanding *in re Mozee* to the district court to reconsider "in the light of the burdens of proof and established law on the subject as developed in cases such as ... *Hochstadt*, *supra*." *Mozee*, 746 F.2d at 374. *Jennings* is also a remand because the circuit court could not tell "what reason [for the discharge] the [district] court thought defendant had proven." Citing *Crown Zellerbach*, the Seventh Circuit simply notes that the term "disloyalty", if left *unexplicated*, will not do as a proffered reason for discharge under §704(a) because any assertion of Title VII rights involves some sense of disloyalty.

The Seventh Circuit is solidly in accord with the Fifth and Sixth Circuits on the law of §704(a).

This concludes a review of all the cases Petitioner calls upon to show that the Fifth and Sixth Circuits disagree with the Third, Fourth, Seventh and Ninth Circuits. It is simply not so.

2. §704(a) needs no further explication.

Petitioner thinks this Court needs to say whether Congress intended to protect only access to the EEOC and the courts. But no circuit court has ever suggested that reading of §704(a). And for good reason: the simple word "or" in §704(a). As some courts have explicitly noted, and as all the circuits have agreed, that word makes it undeniably clear that §704(a) forbids retaliation against two sorts of actions: those in which someone has

"opposed any practice made an unlawful implemment practice by this subchapter, or made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." The second clause, the "participation clause," is obviously what protects access to the EEOC and the courts. The first clause, the "opposition clause," plainly protects something further. No circuit court has ever presumed or held that the first clause, the "opposition clause," is merely an explication or restatement of the second clause, the "participation clause." The word "or" prevents that; the word "or" makes it plain that two different things are protected. Yet petitioner is asking this Court for an explanation, and a ruling, that §704(a) protects more than mere access to the EEOC and the courts. The supposed confusion simply does not exist. The Congressional intent is plain, the wording of §704(a) is plain, and the circuit courts are all in agreement.

Petitioner goes on to ask that an answer be given to the question what counts as protected opposition under the "opposition clause." Yet as Petitioner is well aware, it cannot ask the impossible of this Court: "that a foolproof formula ... be contrived for every case." (Petitioner's Brief, page 13). Petitioner admits that "trial judges will still have to balance the interests of employers and employees in light of a particular fact situation." (Petitioner's Brief, page 13). But that, of course, is precisely what the *Hochstadt* balancing test does.

3. The issue raised is factual only and pertinent only to this case.

This case presents only a factual dispute that concerns pretext. Plaintiff has presented a *prima*

facie case: that only she or other females were asked to do secretarial work. The Defendant has provided a legitimate nondiscriminatory reason: someone must cover for the secretary, and Plaintiff refused when asked. Plaintiff then had to meet the burden of showing that the reason was pretext.

The trial court found that plaintiff failed to carry that burden. The appellate court found no abuse of discretion. The dissent was convinced that Plaintiff had proven pretext, and that the district court had erred in not recognizing this. The difference at bottom is an evidentiary interpretation issue, not a legal issue, and is pertinent only to this particular case. That issue is: what was the employer's motive for the assignment and the discharge. Was it to illegitimately insure that only a woman is put in a woman's job, or was it to insure that employees comply with a legitimate request that places the only or best available employee in a position that needs to be covered?

It would be inappropriate for this Court to grant a writ of certiorari merely to resolve a factual issue of motive pertinent only to this case.

CONCLUSION

The writ of certiorari should be denied by the Court in this case because:

- A) The Circuits are in solid accord.
- B) Nothing indicates that the current law is unclear or inadequate.

- C) The only issue raised by this case is one of factual interpretation pertinent to no other case.

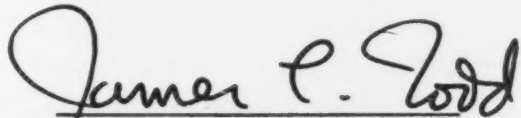
WHEREFORE, PREMISES CONSIDERED, Respondents Texas Department of Water Resources and the Executive Director of the Texas Department of Water Resources pray that the petition for writ of certiorari be denied.

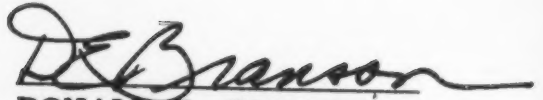
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A handwritten signature in dark ink, appearing to read "D. E. Branson", with a long horizontal flourish extending to the right.

DONALD E. BRANSON

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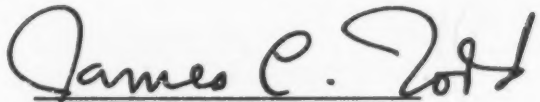
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**ATTORNEYS FOR
RESPONDENTS**

CERTIFICATE OF SERVICE

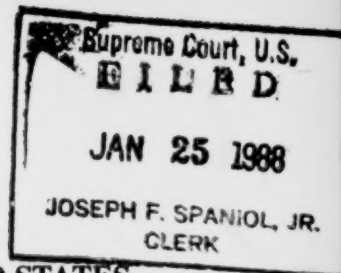
I hereby certify that a true and correct copy of Respondents' Brief in Opposition has been sent by U.S. Mail, certified, return receipt requested, to Stephen Greenberg, Small, Craig & Werkenthin, 100 Congress, #1100, Austin, Texas 78701; and to Sheila S. Asher, Small, Craig & Werkenthin, 100 Congress, #1100, Austin, Texas 78701 on this the 19th day of January, 1988.

A handwritten signature in cursive script, reading "James C. Todd", written in dark ink.

JAMES C. TODD
Assistant Attorney
General



3
NO. 87-522



IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

VICTORIA A. SMITH,

Petitioner

v.

TEXAS DEPARTMENT OF WATER RESOURCES
— and —
THE EXECUTIVE DIRECTOR OF
THE TEXAS DEPARTMENT OF WATER RESOURCES,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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January 1988

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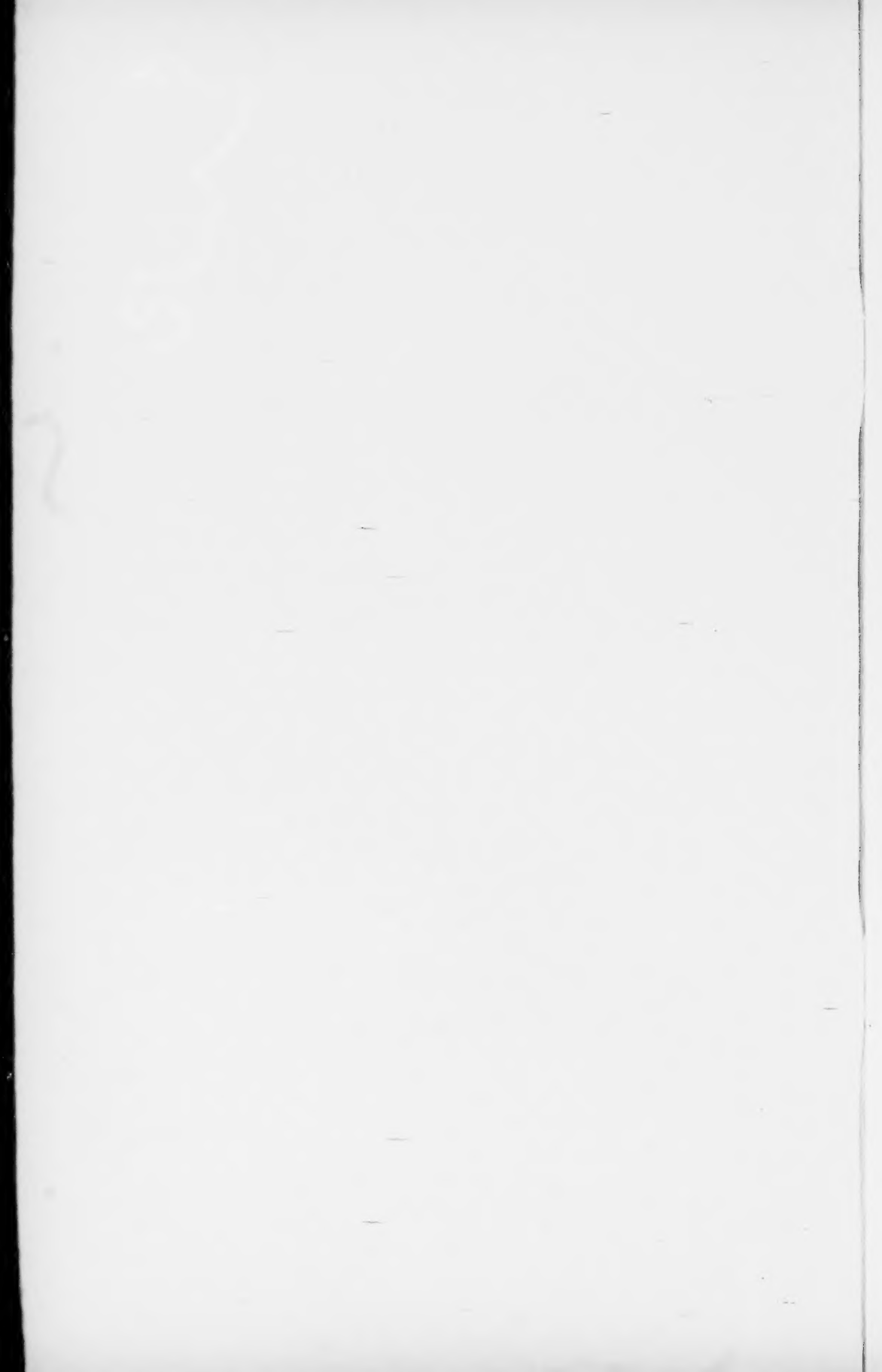


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| <i>Hochstadt v. Worcester Foundation for Experimental Biology</i> , 545 F.2d 222 (1st Cir. 1976). | 2, 4 |
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| <i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792, 803, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1972) | 5 |
| <i>Rosser v. Laborers' Int'l Union of North America</i> , 616 F.2d 221 (5th Cir.) cert. denied, 449 U.S. 886 (1980). | 3, 5 |
| <i>Smith v. Texas Dept. of Water Resources</i> , 818 F.2d 363 (5th Cir. 1987). [The instant case below.] | 4 |
| <i>Smith v. Texas Dept. of Water Resources</i> , 818 F.2d 363 (5th Cir. 1987), <i>Dissenting opinion of Politz, Circuit Judge.</i> [Dissenting opinion in the instant case below.] | 5 |
| <i>Texas Dept. of Community Affairs v. Burdine</i> , 450 U.S. 248, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981) | 4 |

STATUTES

| | |
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| 42 U.S.C. Section 2000e-3, Pub.L. 88-352, Title VII, Section 704(a), Civil Rights Act of 1964, 78 Stat. 257; Pub.L. 92-261, Section 8(c), Mar. 24, 1972, 86 Stat. 109. | 2 |
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Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Petitioner Victoria A. Smith files this Reply Memorandum in response to the Brief in Opposition that has been filed by Respondents pursuant to request of the Clerk of this Court.

ARGUMENT AND AUTHORITIES IN REPLY TO
RESPONDENTS' BRIEF IN OPPOSITION

Many of the statements made in Respondents' Brief in Opposition are amply met by another reading of the Petition and its Appendix. However, some claims and misstatements in the Respondents' opposition brief

might deserve some response. This reply brief is filed by Petitioner to offer such response.

Respondents' major claim in opposing the Petition is that there is no conflict in the Circuits; and, thus, Respondent claims certiorari is inappropriate. Petitioner has not attempted to claim the existence of a pitched or bloody battle among the Circuits. However, a fair reading of the "opposition clause" cases does not produce reassurance that the various circuits are applying legal principles uniformly to cases arising under the "opposition clause" of 42 U.S.C. Section 2000e-3, Pub.L. 88-352, Title VII, Section 704 (a), Civil Rights Act of 1964, as amended, 78 Stat. 257, Pub. L. 92-261, Section 8(c), Mar. 24, 1972, 86 Stat. 109.

Respondent has wrongly characterized as a lack of conflict among the Circuits their usual willingness to cite and pay lip service to the balancing test announced in *Hochstadt v. Worcester Foundation for Experimental Biology*, 545 F.2d 222 (1st Cir. 1976), ["the *Hochstadt* balancing test"]. Petitioner does not believe the mere mention of the *Hochstadt* balancing test in a Court of Appeals opinion is a talisman that precludes further analysis or careful reading of the decisions in which the phrase occurs. Counsel have attempted in the Petition for Certiorari to realistically address, howsoever briefly, the principles manifesting differently among the Circuits concerning the nature of the protection afforded by section 704(a) of Title VII. Contrary to Respondents' insinuation, the Petition plainly states (at p.12) that most Courts of Appeals have cited *Hochstadt*. Whether the different courts apply *Hochstadt* in the same fashion is another question, however, to which the answer given by a careful reader will be "No."

Contrary to the innuendo pervading Respondents' brief, Petitioner never claimed that the Third, Fourth, Seventh and Ninth Circuits were expounding a formulaic rule of law for deciding cases under the opposition clause of Title VII's section 704(a) altogether different from the Fifth and Sixth Circuits. Rather, Petitioner's position is: (1) that the *Hochstadt* balancing test by itself is barren and meaningless as a legal standard, is easily cited to support any result, and does not serve the remedial purposes of Title VII; and, (2) that the Circuit Courts of Appeals are weighting the "balance" (such as it is) between employee rights and employer prerogatives in quite different ways -- that they are, in fact, applying different legal standards to interpret and to apply the opposition clause to concrete facts.

In their Opposition Brief, Respondents challenge Petitioner to state a workable alternative to the *Hochstadt* balancing test. Counsel for Petitioner believe they can articulate the basis for an alternative, but neither the Petition for Certiorari nor the Petitioner's Reply Memorandum is an ample forum for the amount of discussion and argument requisite to a serious analysis of such alternatives. Furthermore, Respondents neglect to acknowledge that both the Seventh and the Ninth Circuits, unlike the other circuits, apply an explicit "reasonableness test" devised by the Ninth Circuit as a needed addition to the *Hochstadt* balancing test in *EEOC v. Crown Zellerbach*, 720 F.2d 1008 (9th Cir. 1983). (discussed in the Petition at pp.11-12.) The curious fact, however, is that Title VII's remedial purposes and emphasis upon resolving employment disputes by conciliation have somehow been omitted from the legal reasoning encouraged by the *Hochstadt* balancing test.

Respondents argue that the different results in the various "opposition clause" cases cited in the Petition for Certiorari turn only on the facts of each case, rather than on differing interpretations of applicable law. It may be true that cases with different facts are going to come out differently; but such a platitude offers little help to judges trying to decide cases or to attorneys trying to advise clients about the lawfulness of particular conduct. One implication of such reasoning would be to expect different results depending upon who the plaintiff is. Does Title VII permit such fact-directed results or does it require more careful application of a reasoned rule of decision? Respondents' argument ignores the confusing precedential effect of cases like the instant one below, which give no guidance as to what legal principles will be applied in analyzing the facts of an "opposition clause" case. The truth is that the precedents set in the Fifth Circuit by the case at bar and other cases cited in the Petition will not lead to the same results as will factually analogous precedents set in other Circuits, especially the Seventh and Ninth Circuits.

For example, the facts of the Fifth Circuit case *Rosser v. Laborers' Int'l Union of North America*, 616 F.2d 221 (5th Cir. 1980), are parallel to the facts of *Jennings v. Tinley Park Community Consol. Sch. Dist.*, 796 F.2d 962 (7th Cir. 1986). However, the legal analyses and results are different. In *Rosser*, the plaintiff, a black woman, was a dues-posting clerk who worked in the office of the defendant union and was a member of the union. Her direct supervisor was the secretary-treasurer of the union. A group of

black union members felt Mrs. Rosser would be a better representative for them and persuaded her to run for election for secretary-treasurer against her boss. Mrs. Rosser was discharged by her boss two days after he was re-elected. The Fifth Circuit "reasoned" that Mrs. Rosser, by standing for election, had placed her "loyalty and cooperation...in doubt," and that therefore her employer had a valid, nondiscriminatory reason for firing her. In *Jennings*, the plaintiff was a female secretary to a school district superintendent. She drafted and delivered to the Board of Education a salary study presented on behalf of the school district's secretaries, who were disgruntled by the school district's custom of paying overtime to the custodians (all male), but not to the secretaries (all female). Two weeks after delivering the salary study to the School Board, Mrs. Jennings was fired by her boss, who said that although her work was excellent, she had not been "loyal and supportive". The Seventh Circuit ruled that the defendant had not provided a legitimate, nondiscriminatory reason for firing Mrs. Jennings, and that she was protected by the opposition clause of section 704(a). (It might be noted that while the Fifth Circuit in *Rosser* cited *Hochstadt v. Worcester Foundation, supra*, the Seventh Circuit in *Jennings* cited *EEOC v. Crown Zellerbach, supra*.) Are the *Rosser* and *Jennings* cases representative of the complete and explicit accord which Respondents claim to see among the circuits?

Respondents' opposition brief says repeatedly that the central issue in the instant case is a simple factual determination of whether Miss Smith's employer had a retaliatory motive in discharging her. This argument is born of confusion about which stage of proof in Title VII cases is at issue in the case at bar and the other cases discussed in the Petition for Certiorari. *Smith v. Texas Dept. of Water Resources*, 818 F.2d 363 (5th Cir. 1987); *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-53, 101 S.Ct. 1089, 1093, 67 L.Ed. 207 (1981). The central issue presented in the instant case, as in most section 704(a) cases cited in the Petition, is the second stage of the *Burdine* analysis: whether the defendant-employer has articulated a legitimate, nondiscriminatory reason for the adverse action taken against the plaintiff-employee. Respondents' argument about motive goes to the third stage of the *Burdine* analysis: whether, if a legitimate, nondiscriminatory reason for discharge was successfully articulated, the plaintiff can show that the reason given was just a pretext for unlawful retaliation. See, *Jennings v. Tinley Park Community, etc., supra*, 796 F.2d at 966, and *Texas Dept. of Community Affairs v. Burdine, supra*, 450 U.S. at 252-53, 101 S.Ct. at 1093.

The question of whether the employer articulated a legitimate, nondiscriminatory reason for discharge is preeminently a legal issue in the context of an opposition clause case, since the question to be decided by the judge is whether the employee's opposition activity is of a sort that the opposition clause of section 704(a) was intended to protect or whether the conduct was criminal or so disruptive as to be unprotected. It is this issue and its treatment which is at the heart of the Fifth Circuit's opinion in the instant case.

The *Rosser v. Laborers' Int'l Union of North America* case, *supra*, and the instant case are exemplary of the Fifth Circuit's willingness to judge an employee's conduct excessively disruptive (and unprotected) regardless of the absence of evidence of disruption and regardless of whether the conduct might be constitutionally protected rather than deliberate unlawful activity against the employer.¹ The corollary to this sort of "opposition clause" reasoning is to accept virtually anything as a legitimate business reason for dismissal in the context of an employer's meeting its burden to articulate an explanation for its acts under *Burdine*, *supra*.

At p. 7 of their brief Respondents try to distinguish *Armstrong v. Index Journal Co.*, 647 F.2d 441 (4th Cir. 1981) from the instant case by virtue of its "crucial facts." Respondents note that in the *Armstrong* case, the employer had decided to fire Ms. Armstrong before she performed the act she was allegedly fired for. Rather than distinguishing *Armstrong* from the instant case, this employer conduct further highlights the parallel facts of the two cases. Just as in *Armstrong*, the decision to fire Miss Smith was made by the employer, and the paperwork was done, before she committed the act of alleged insubordination for which she was supposedly fired. *See*, Petition at pp.4-5 and Dissenting Opinion of Judge Politz reproduced at Petition Appendix P. A-8.

Respondents' opposition brief contains other errors and misstatements, though for the sake of brevity this reply memorandum is not intended to be an exhaustive catalog of such errors and will address only a few. At p. 3 of their brief, Respondents object to a statement made at p. 7 of the Petition, and intimate that Petitioner fabricated, rather than

1. An early characterization by this Court of conduct that is not protected under 42 U.S.C. §2000e-3 was "deliberate, unlawful activity against [the employer]." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803, 93 S.Ct. 1817, 1825, 36 L.Ed.2d 668 (1972). This rare definition of unprotected employee conduct was ignored in the court below.

quoted, language from the opinion below which seems to Petitioner to clearly import a new requirement into the employee's burden of proof in a Title VII case -- i.e., showing that the opposed employment practice is "immoral, degrading, or dangerous to health." In fact, the quote was merely mis-cited in the Petition -- a regrettable but hardly pernicious mistake. The correct cite for the quote in question is 818 F.2d at 366. (Petition Appendix at A-5).

In one instance, Respondents' argument is either willful distortion of facts or an expression of appalling ignorance of the case and the pertinent issues on appeal. At p. 5 of their brief, Respondents' find it "not surprising" that courts rule against employees who choose "to bypass or augment established grievance procedures which all agree are fair and satisfactory." (Respondents' Brief in Opposition, p. 5.) Such observations, when used to refer to the facts or issues of the instant case or the instant appeal, create distortion. Miss Smith did utilize the Department's grievance procedures to no avail, but the record is sparse as to that proceeding and those efforts. In any case, it is certain that all do not agree the Respondents' grievance procedures "are fair and satisfactory," and to suggest there is unanimous consensus about such matters is not being candid with this Court.

Petitioner also takes issue with the accuracy of Respondents' characterization of Miss Smith's conduct as refusal to merely perform a task asked of her. What was indisputably involved was not a request that Miss Smith perform a single task, but a permanent and significant change in the duties of a female technical employee from technical to secretarial ones, something which had never been asked of male predecessors in that technical job. It was also undisputed that Miss Smith had, upon request, performed the secretarial relief duties in question before. It was only when a man who was not her usual supervisor tried to impose secretarial tasks on Miss Smith permanently and irrevocably that she showed reluctance to take on duties that were so different from she had been hired to perform and about which she had been given assurances (that were not honored).

Respondents' characterization of Miss Smith's actions implies that her conduct was disruptive to her workplace, but in fact there is absolutely no evidence of any disruption of the employer's operations in the record, aside from the ire of an executive in the agency who hung up on Miss

Smith when she attempted to discuss the matter with him over the telephone.

CONCLUSION

In addition to the reasons supporting the grant of certiorari heretofore advanced by Petitioner in her Petition and the Conclusion thereof, Petitioner says that the writ of certiorari should be granted by the Court in this case because:

A) Respondents' long-awaited Brief in Opposition to the Petition for Certiorari fails to set forth any sound reason why a writ of certiorari should not issue.

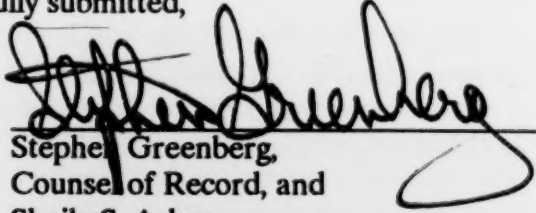
B) Contrary to Respondents' assertions, there is a discernable conflict among the Circuit Courts of Appeal regarding the interpretation and application of Title VII's "opposition clause." The basis of this conflict lies in the differing legal standards (howsoever sparsely articulated) that the various courts have adopted in considering "opposition clause" cases.

C) Contrary to Respondents' assertions, the results in the judgment and opinions below turn not merely on acceptance of the district court's fact-finding, but more fundamentally on court of appeals and district court interpretations of the law which are incorrect, or at the very least, are not harmonious with the remedial spirit of Title VII.

D) The Fifth Circuit's willingness to find most any conduct disruptive and, therefore, unprotected by Title VII's opposition clause, without any accompanying analysis or justification, suggests the necessity of review by this Court.

WHEREFORE, PREMISES CONSIDERED, Petitioner Victoria
A. Smith prays that the petition for writ of certiorari be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Stephen Greenberg", is written over a horizontal line.

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